BEFORE THE FEDERAL ELECTION COMMISSION

IN RE:	
CHRISTOPHER VAN HOLLEN, JR.,	
DEMOCRACY 21,	
THE CAMPAIGN LEGAL CENTER,	**MUR 7024**
Respondents.	

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RESPONSE OF RESPONDENTS DEMOCRACY 21 AND THE CAMPAIGN LEGAL CENTER

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RESPONSE OF RESPONDENTS
DEMOCRACY 21 AND THE CAMPAIGN LEGAL CENTER

Respondents, Democracy 21 and The Campaign Legal Center ("CLC"), hereby request that the Federal Election Commission ("FEC" or the "Commission") find no reason to believe that Respondents violated the Federal Election Campaign Act of 1971 ("FECA") as alleged in the MUR 7024 Complaint.

INTRODUCTION

Since the FEC's founding, elected officials and advocacy groups have worked with attorneys on a pro bono basis to litigate structural challenges to the conduct of federal elections in the United States. In the seminal case of *Buckley v. Valeo*, lawyers worked pro bono to represent a group of plaintiffs that included elected officials and political parties.[1] More recently, in *McConnell v. FEC*, the current Senate Majority Leader relied on pro bono legal services to serve as the lead plaintiff in a challenge the Bipartisan Campaign Reform Act

[1] Ralph K. Winter, Jr., *The History and Theory of* Buckley v. Valeo, 6 J. L. & POL'Y 93, 93 (1997).

(BCRA).[2] That such litigation may have provided a reputational benefit to the elected officials did not convert these pro bono legal services into a "contribution" under the FECA. Indeed, as a general matter, federal elected officials regularly engage in litigation on matters of public concern—either as parties or supporting amici—using pro bono legal services, and such services have not been subject to the contribution limits in FECA, notwithstanding any potential reputational benefit to the official.[3]

Consistent with this established practice, Democracy 21 and CLC provided pro bono representation to Rep. Christopher Van Hollen, Jr. ("Van Hollen") in a 2011 lawsuit and rulemaking petition, taking the position that existing FEC regulations are contrary to law because they allow certain organizations to keep secret the donors whose funds are being used for election-influencing activity. No one could have been surprised by the involvement of these organizations in litigation or rulemaking on these issues. Democracy 21 and CLC appear frequently before the FEC and the courts, including in many of the most significant campaign-finance cases over the past fifteen years, and they have established track records of litigating over generally applicable election laws and regulations. They are non-partisan organizations that have never endorsed or supported a candidate for office. The pro bono services challenged here were consistent with—and part of—the organizations' longstanding advocacy for greater transparency in federal campaign finance laws.

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[2] Nick Anderson, *Starr Will Help Fight Finance Reform*, L.A. TIMES, Mar. 22, 2002, *available at* http://articles.latimes.com/2002/mar/22/news/mn-34161 (reporting that Kenneth W. Starr, Floyd Abrams, and Kathleen M. Sullivan provided pro bono legal services to Sen. McConnell).

[3] *See, e.g.*, Christian Newswire, *Members of Congress File Amicus Curiae Brief with U.S. Supreme Court Addressing Illegality of 'Revenue Raising' Obamacare Originating in Senate* (Dec. 2, 2015), http://christiannewswire.com/news/3077577104.html (Forty-six United States Representatives relied on pro bono legal services to file an amicus brief in *Sissel v. Dep't Health & Human Services*, No. 15-543 (U.S. cert. denied Jan. 19, 2016); Press Release, *Alaska Delegation Files Supreme Court Amicus Brief in Support of John Sturgeon Case* (Nov. 23, 2015), http://donyoung.house.gov/news/documentsingle.aspx?DocumentID=398544 (Senator Lisa Murkowski, Senator Dan Sullivan, and Representative Don Young relied on pro bono legal services to file an amicus brief in *Sturgeon v. Frost*, No. 14-1209 (U.S. rev'd Mar. 22, 2016)).

Cause of Action Institute and its Executive Director (collectively "Cause of Action") now argue that Democracy 21 and CLC's provision of pro bono legal services in support of their longstanding mission of reforming campaign finance laws should be treated as an impermissible campaign contribution to Van Hollen. Because Cause of Action can point to no evidence that Democracy 21 and CLC's purpose was to further Van Hollen's House or Senate campaigns (it emphatically was not), Cause of Action instead asks the Commission to adopt a new standard under which services would be treated as contributions subject to FECA if they may confer any indirect benefit—such as reputational enhancement—on a particular candidate or campaign, irrespective of the intent of the donor. Cause of Action's sweeping theory would be unworkable in practice and would effectively outlaw the longstanding practice of using pro bono legal services in structural challenges to campaign finance laws and regulations as well as other cases involving public policy.

Because there is no support in FECA, Commission regulations, or the Commission's past practice to support an investigation into this Complaint, the FEC should find no reason to believe that Democracy 21 and CLC violated the Act and should take no further action in this matter.

SUMMARY OF ARGUMENT

The pro bono legal services at issue here are not "contributions" under FECA. The statute provides two alternate definitions of "contribution"—either (i) anything of value for the purpose of influencing a federal election or (ii) a payment to a political committee for any purpose. The services here meet neither definition.

First, the services were not rendered for the purpose of influencing any election for Federal office. Pro bono legal services provided for structural challenges to the legality and

interpretation of generally applicable campaign finance laws do not seek to influence the outcome of any particular Federal election. As such, they are analogous to challenges to reapportionment plans or litigation over ballot access rules, both of which the Commission has determined are not subject to FECA.

Even if *some* pro bono services might, under certain circumstances, qualify as contributions, there is no question that the pro bono services at issue here contain none of the indicia that serve to identify activity that is for the purpose of influencing a Federal election. These activities involved neither express advocacy nor campaign solicitations—the clearest indicia of election-influencing "contributions" under Commission precedent. Moreover, the public record clearly establishes (and Cause of Action fails to allege otherwise) that Democracy 21 and CLC's purpose in providing legal services was to further their longstanding and well-established interests in promoting campaign finance reform, not to influence a particular election in which Van Hollen was a candidate. The rulemaking and litigation each had a clear "non-election related aspect"—seeking administrative or judicial relief to require greater donor disclosure in campaign finance regulations—which distinguishes them from election-influencing activities.

Cause of Action's arguments for why these pro bono services are "contributions" rest on an erroneous theory of indirect benefit. Its principal argument—that any activity providing reputational benefit to a candidate is a "contribution"—is squarely foreclosed by the Commission's past opinions. Its alternative argument—based on Van Hollen's standing-related allegations about how the regulation at issue could potentially affect him—fails to recognize crucial differences between standing in federal court and a "contribution" under FECA. And, as

noted above, accepting Cause of Action's erroneous indirect-benefit theory would be both highly disruptive and unworkable in practice.

Second, the pro bono legal services were not a payment to a political committee because they were given directly to Van Hollen, not his campaign committee. Cause of Action has no basis for alleging otherwise.

ARGUMENT

I. DEMOCRACY 21 AND CLC'S PRO BONO LEGAL SERVICES WERE NOT A "CONTRIBUTION" AS DEFINED UNDER § 8(A)(I) OF FECA

The gravamen of Cause of Action's complaint is that pro bono legal services are a "contribution" because they may indirectly benefit a federal candidate. That argument relies on the first part of the statutory definition of a "contribution," which encompasses "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office*." 52 U.S.C. § 30101(8)(A)(i) (emphasis added; hereinafter "§ 8(a)(i)"). But a proper understanding of the emphasized language demonstrates that the pro bono legal services in this case were not performed "for the purpose of influencing any election for Federal office." Accordingly, they are not contributions under § 8(a)(i).

A. Structural Challenges To Generally Applicable Campaign Finance Laws And FEC Regulations Are Not "For the Purpose Of Influencing" Federal Elections

The Commission has distinguished between generally applicable structural challenges to campaign laws unrelated to a specific election and litigation designed to assist only a specific campaign. It has declined to treat supporting services for the former as "contributions," notwithstanding any indirect benefit the litigation may confer on a particular candidate. This

distinction is reflected in the Commission's advisory opinions related to reapportionment of House seats and challenges to primary-qualification rules, both of which the Commission has determined to be outside the scope of the Act because they are not undertaken "for the purpose of influencing any election for Federal office." § 8(a)(i).

In FEC advisory opinion 1981-35, the Commission addressed whether the financing of reapportionment litigation was a "contribution" under § 8(a)(i). The Commission recognized that "[e]ssential aspects of the Federal election process are ... dependent on [reapportionment] decisions" and thus "[a]ttempts to influence a state legislature's decisions on reapportionment plans may have political features." Nevertheless, it concluded that such attempts and "litigation which relates to reapportionment decisions" "are not necessarily election-influencing activity of the type subject to" FECA. The Commission specifically distinguished such litigation from challenges "instituted by one candidate to disqualify an opposing candidate from the election ballot," which the FEC had previously ruled was a contribution (FEC AO 1980-57) because it "represented an effort to deny the electorate the opportunity to vote for the opposing candidate" and was therefore "for the purpose of influencing an election." By contrast, "[t]he influencing of reapportionment decisions of a state legislature, although a political process, is not considered election-influencing activity subject to the requirements of [FECA]."

In FEC advisory opinion 1982-14, the Commission reaffirmed that conclusion. The Michigan Republican State Committee—an organization ordinarily engaged in election-influencing activity—sought to create a segregated fund to receive and disburse funding to influence (and potentially legally challenge) Michigan's 1980 congressional reapportionment. Notwithstanding the organization's purpose and function, the Commission ruled that such funding was not a contribution. It reiterated that "[t]he influencing of reapportionment decisions

of a state legislature, although a political process, is not subject to the requirements of the [FECA]."

In FEC advisory opinion 1982-35, the Commission confronted a similar question regarding a political party's primary-ballot access rule. The Massachusetts Democratic Party required a candidate to receive 15% of the votes cast at the party's convention to challenge the party's endorsed candidate on the primary election ballot. A prospective Democratic candidate for federal election (who could meet the state-law petition requirement but not the party-specific 15% rule) wanted to raise money to bring a constitutional challenge to the party rule, and asked the Commission whether such funding was a contribution under FECA. The Commission ruled that it was not. The candidate was not "attempting to influence a Federal election by preventing the electorate from voting for a particular opponent" but rather "propos[ing] to use the judicial system to test the constitutionality of the application of the party rule to his candidacy." Because the lawsuit was "in this case, a condition precedent to the candidate's participation in the primary election," his activity to raise funds for such litigation was "outside the purview of the [FECA.]"

If challenges to reapportionment plans or party primary-qualification rules within a particular state are not contributions within the Act, notwithstanding the "political features" inherent in such challenges (AO 1981-35), it follows *a fortiori* that neither a petition for a nationally applicable rulemaking nor litigation that seeks nationwide relief are contributions either. In fact, the Commission's prior advisory opinions addressed challenges with far more immediate political impact than those at issue here. For example, the lawsuit addressed in AO 1982-35 directly determined a candidate's ability to participate in a particular election. Here, the rulemaking and lawsuit are not "condition[s] precedent" to Van Hollen's personal participation in a particular campaign; rather, they concern the rules that apply to *all* candidates in *all* federal

elections. The nature of the effect of the underlying lawsuit and rulemaking proceeding on any specific candidate or election is far more indirect than in the redistricting and primary-qualification challenges, which the Commission concluded were outside the scope of FECA.

As in the primary-qualification challenge, Van Hollen's lawsuit has sought to "use the judicial system to test" the legality of the campaign-finance laws. FEC AO 1982-35. That effort—and, in particular, Democracy 21 and CLC's involvement—have not supported his election (or any particular election) directly; rather, the lawsuit was a challenge to the "illegal structuring of a competitive environment." *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005). And challenges to election structure are not "election-influencing activity of the type subject to the Act and regulations." FEC AO 1981-35.

B. Neither Democracy 21 Nor CLC Provided Legal Services For The Purpose Of Influencing Van Hollen's Election

The Commission need not adopt a categorical rule that pro bono campaign-finance legal services are never contributions under § 8(a)(i) to dismiss the complaint, because it is plain that the purpose of the specific legal services that Cause of Action challenges was not to influence an election. The intent of the donor is crucial because the statutory language in § 8(a)(i) looks to the "purpose" of the donation. In evaluating whether an activity qualifies as a "contribution," the Commission thus squarely rejected a test based solely on the effects of the activity and instead required affirmative evidence of the donor's intent to influence a specific election:

> [A]lthough media or other public appearances by candidates may benefit their election campaigns, the person defraying the costs of such an appearance will not be deemed to have made a contribution in-kind to the candidate absent an indication that such payments are made to influence the candidate's election to Federal office.

AO 1982-56. *See also* AO 1992-06 (citing 1982-56); 1992-05 (same); 1986-06 (same); 1985-38 (same).

1. Neither Democracy 21 nor CLC undertook activities involving express advocacy or solicitation intended to influence Van Hollen's election

The Commission first applies a two-part test for determining donor intent. Funding an activity is not a "contribution" under this test "if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event." *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986); *see also, e.g.*, FEC AO 1996-11; 1994-15; 1992-6; 1992-05; 1988-27. Neither part of this test is satisfied here: The litigation and petition for rulemaking consisted of legal filings, not express advocacy for Van Hollen's election or a campaign contribution solicitation. Those facts are sufficient to conclude that neither Democracy 21 nor CLC made a "contribution" under § 8(a)(i).

2. The "totality of the circumstances" does not compel a different result

In the absence of express advocacy or a solicitation, the Commission may go beyond the two-part test to determine intent (*see, e.g.*, AO 1994-15), considering the totality of circumstances to assess whether an activity would be objectively perceived as an intentional attempt to influence an election (*see, e.g.*, AO 1990-05). But no objective observer could conclude that Democracy 21 and CLC acted with the purpose of influencing Van Hollen's election under the totality of the circumstances here.

Democracy 21 and CLC are election-law reform organizations with an extensive history of working to strengthen the country's generally applicable election laws and regulations, both

through administrative proceedings and through litigation. *See* FEC AO 1983-12 ("The purpose and functions of an organizational entity are material and relevant to the Commission's characterization of the underlying purpose of a specific activity or program of that entity."). Democracy 21 and CLC's mission is to "promote[] campaign finance reform" by "eliminat[ing] the undue influence of big money in American politics" and "[w]orking in administrative, legislative and legal proceedings" to "attack laws and regulations that undermine the fundamental rights of all Americans to participate in the political process." Exhibit A; Exhibit B. Consistent with that mission, Democracy 21 and CLC have filed at least 65 sets of comments on FEC advisory opinion requests[4] and at least 32 sets of comments in FEC rulemakings[5] since

[4] Comments of Democracy 21 on AOR 2003-3 (Cantor) (April 22, 2003); Comments of Democracy 21 on AOR 2003-12 (April 21, 2003); Comments of Democracy 21 and Campaign Legal Center on AOR 2003-37 (Dec. 17, 2003) (Americans for a Better Country); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-05 (February 12, 2004) (Americans Coming Together); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-30 (Citizens United) (August 13, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-31 (Darrow) (August 13, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-35 (recounts) (Sept. 16, 2004); Comments of Democracy 21 and Campaign Legal Center on AORs 2004-38 and 2004-39 (recounts) (Oct. 25, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-43 (Missouri Broadcasters) (December 15, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-43 (Missouri Broadcasters) (OGC draft) (February 11, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-45 (Salazar) (January 26, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2005-13 (Emily's List) (Sept. 9, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2005-16 (Fired Up) (Sept. 26, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2005-16 (Fired Up) (OGC Draft) (Nov. 16, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-10 (EchoStar) (March 10, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-11 (Wash. State Party) (March 13, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-19 (LACDP) (May 22, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-19 (LACDP) (Supplemental Comments) (May 24, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-14 (NRA) (June 21, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-20 (Unity 08) (June 19, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-20 (Unity 08) (Supplemental Comments) (Aug. 23, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-24 (recounts) (Aug. 24, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-24 (recounts (Supplemental Comments) (Oct. 3, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-31 (Casey) (Oct. 2, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-32 (PFAVF) (Oct. 10, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-31 (Casey) (Supplemental Comments) (Oct. 12, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-03 (Obama) (Feb. 20, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-04 (Atlatl) (April 17, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-09 (Kerry-Edwards) (July 2, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-09 (Kerry-Edwards) (OGC Draft) (July 25, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-11 (Calif. State parties) (July 5, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-28 (McCarthy) (Nov. 5, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-32 (SpeechNow.org) (Dec. 10, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-33 (Club for Growth PAC) (Dec. 10, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-28 (McCarthy) (Draft opinions) (Dec. 12, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-09 (Lautenberg) (August 18, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-14 (Melothe) (Sept. 29, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-15 (NRLC) (Oct. 9, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-15 (NRLC) (Draft opinions)

(Oct. 22, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2009-04 (Franken) (Draft opinions) (March 18, 2009); Comments of Democracy 21 and Campaign Legal Center on AOR 2009-13 (Black Rock) (July 15, 2009); Comments of Democracy 21 and Campaign Legal Center on AOR 2009-13 (Black Rock) (Draft opinion) (July 27, 2009); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-03 (redistricting) (March 15, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-07 (Yes on FAIR) (April 27, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-08 (Citizens United) (Draft opinions) (June 9, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-20 (NDPAC) (Aug. 27, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-9 (Facebook) (Draft opinions) (June 14, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-11 (Colbert) (May 27, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-12 (Majority PAC) (June 6, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-21 (CCF) (Nov. 3, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-23 (American Crossroads) (Nov. 14, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-11 (Free Speech) (March 22, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-14 (McCutcheon) (March 26, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-19 (American Future Fund) (May 11, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-25 (AFF) (Aug. 3, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-27 (National Defense Committee) (Aug. 6, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-32 (Tea Party) (Oct. 3, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-04 (DGA) (July 8, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-09 (SOS) (July 22, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-10 (DSCC) (Aug. 2, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-17 (TPLF) (Oct. 18, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-17 (TPLF) (Draft opinions) (Nov. 20, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-18 (Revolution Messaging) (Feb. 25, 2014); Comments of Democracy 21 and Campaign Legal Center on AOR 2014-12 (RNC and DNC) (Oct. 8, 2014); Comments of Democracy 21 and Campaign Legal Center on AOR 2015-09 (Senate Majority PAC) (Oct. 27, 2015).

[5] Comments of Democracy 21 on NPRM 2002-07 (soft money) (May 29, 2002); Comments of Democracy 21 on NPRM-13 (electioneering communications) (Aug. 21, 2009); Comments of Democracy 21 on NPRM 2002-14 (contribution limits); Comments of Democracy 21 on NPRM 2002-16 (coordination) (Oct. 11, 2002); Comments of Democracy 21 on NPRM 2002-28 (Leadership PACs) (Jan. 30, 2003); Comments of Democracy 21 on NPRM 2003-08 (public financing) (May 23, 2003); Comments of Democracy 21 on NPRM 2003-09 (enforcement policies) (May 30, 2003); Comments of Democracy 21 and Campaign Legal Center on NPRM 2004-06 (definition of "political committee") (April 5, 2004); Comments of Democracy 21 and Campaign Legal Center on NPRM 2004-17 (tax exempt organizations) (Jan. 7, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-03 (agents) (March 4, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-06 (solicitations) (March 28, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-10 (Internet) (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-12 (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-12 (state party salaries) (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-13 (federal election activity) (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-20 (electioneering communications) (Sept. 30, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-24 (solicit) (Oct. 28, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-28 (coordination) (Feb. 1, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-28 (coordination) (Supplemental comments) (Jan. 13, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2006-05 (coordination) (March 22, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2006-07 (federal election activity) (May 22, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2007-23 (bundling) (Nov. 30, 2007); Comments of Democracy 21 and Campaign Legal Center on NPRM 2007-23 (bundling) (Supplemental comments) (Sept. 24, 2008); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-22 (federal election activity) (Nov. 20, 2009); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-22 (federal election activity) (Jan. 6, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-23 (coordination) (Jan. 9, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-26 (fundraising events) (Feb. 8, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2010-01 (coordination) (Feb. 24, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2010-01 (coordination) (Supplemental comments) (March 15, 2010); Comments of Democracy 21 and Campaign Legal Center on ANPRM 2011-14 (Internet) (Nov. 14, 2011); Comments of Democracy 21 and Campaign Legal Center on REG 2014-01 (McCutcheon) (Jan. 15, 2015); Comments of Democracy 21 and Campaign Legal Center on REG 2015-04 (independent spending) (Oct. 27, 2015).

BCRA was enacted in 2002. Moreover, they have been active participants in some of the major election-law cases in the last decade,[6] including serving as counsel in the *Shays* line of cases. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005); *Shays v. FEC*, 424 F. Supp. 100 (D.D.C. 2006). *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

In particular, Democracy 21 and CLC have a long history working on the regulations at issue in the *Van Hollen* litigation. In 2007, Democracy 21 and CLC filed lengthy comments on their own behalf on the FEC's notice of rulemaking for the regulations. *See* Exhibit C. And representatives from both organizations testified in the rulemaking hearing. *See* Exhibit D. In 2011, when both organizations served as counsel to Van Hollen in the lawsuit challenging the regulations, their focus always remained on the proper interpretation of the election laws. Democracy 21's press releases, for example, emphasized the merits of the litigation and made virtually no mention of Van Hollen's candidacy for office. *See, e.g.*, Exhibit E; Exhibit F; Exhibit G; Exhibit H. Enclosed with this motion are affidavits by representatives of both Democracy 21 and CLC confirming that their involvement in the litigation was not for the purpose of influencing Van Hollen's election; rather, Van Hollen served as plaintiff to guarantee standing under D.C. Circuit law and thus avoid any potential jurisdictional issues that might have otherwise hindered Democracy 21 and CLC's efforts to pursue a legal challenge to the

[6] *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1478 (2014) (Breyer, J., dissenting) (citing CLC brief for proposition that joint fundraising committees and intra-party transfers allow "candidates, parties, and party supporters" to "avoid[] the base contribution limits"); *National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 18 (D.C. Cir. 2009) (citing CLC and Democracy 21 brief to counter "straw man" arguments that lobbying disclosure law cannot permissibly cover lobbying association because law is underinclusive); *Independence Institute v. FEC*, 70 F. Supp. 3d 502, 509 & n.12 (D.D.C. 2014) (citing CLC and Democracy 21 brief in rejecting argument that election disclosure requirements should be different for section 501(c)(3) organizations and section 501(c)(4) organizations), *rev'd and vacated*, 816 F.3d 113 (D.C. Cir. 2016); *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 n.1 (D.D.C. 2012) ("As amici Campaign Legal Center and Democracy 21 explain, because primary and general elections held during the same calendar year count as separate elections, 11 C.F.R. §§ 100.2, 110.1(j), an individual might contribute $5,000 to each of a party's House and Senate candidates, $30,800 to each of a party's three federal party committees each year, and $10,000 to each of a party's fifty state committees a year."), *rev'd and remanded*, 134 S. Ct. 1434 (2014).

regulations at issue. Exhibit I; Exhibit J. The totality of circumstances—the organizations' mission, their historical role in advocating for campaign finance reform, and their particular conduct surrounding the FEC regulations at issue here—would compel any objective observer to conclude that Democracy 21 and CLC did not provide these pro bono legal services "for the purpose of influencing any election for Federal office." § 8(a)(i).

3. The litigation and rulemaking have a "significant non-election related" aspect

In assessing the "purpose" of a challenged activity, the Commission also considers whether the "activity in question ... appear[s] to have any specific and significant non-election related aspect that might distinguish it from election influencing activity." AO 1983-12. In that advisory opinion, for example, a political committee requested guidance on whether it could run television commercials with footage of incumbent U.S. senators and a message congratulating the citizens of the incumbents' states for having elected that senator. The Commission ruled that such commercials were in-kind contributions in part because the committee had failed to identify any specific and significant non-election related aspect. And it distinguished such activities from: (1) a Congressman hosting a public-affairs discussion program, which served the non-election purpose of serving the "duties of a Federal officeholder" (AO 1981-37); (2) a candidate's television advertisements appealing for funds for a charitable organization, which served the principal purpose of helping the organization, not the candidate (AO 1978-88); and (3) a candidate's radio shows, which served the purpose of his basic employment with the broadcast station (AO 1977-42). In all three examples, the "non-election related aspect" was apparent to the Commission.

The same should be true here, as the "non-election related aspect" of the rulemaking and legal proceedings predominate over any indirect election-related benefit to Van Hollen that

Cause of Action has alleged. The exclusive goal of both the rulemaking and the litigation is to change the FEC regulations to require greater donor disclosure—not to influence the election of any particular candidate.

C. Cause of Action's Theory of Indirect Benefit is Both Incorrect And Disruptive

Because Cause of Action does not and cannot allege that Democracy 21 or CLC's intent was to influence Van Hollen's election (the relevant inquiry under § 8(a)(i)), it asks the Commission to rule that the challenged activities constitute a contribution because the legal proceedings allegedly resulted in an incidental benefit to Van Hollen as a candidate. Although Cause of Action includes the bare allegation that the pro bono legal services provided a "direct benefit" to Van Hollen's campaign (Compl. ¶ 17), it does not point to anything that could even charitably be described as such. Instead, Cause of Action hints at two sorts of decidedly indirect benefits: First, that Van Hollen may receive a general reputational boost by being associated with the lawsuit. *See, e.g., id.* ¶¶ 32-33. Second, that Van Hollen, in establishing his standing to bring the lawsuit, explained how the regulation at issue could potentially affect him. *See, e.g., id.* ¶ 32 n.54. Both arguments rest on an indirect-benefit theory that is foreclosed by the Commission's past opinions, would be unworkable in practice, and would eliminate the longstanding practice of federal candidates using pro bono legal services in cases of public concern.

1. The FEC has already rejected Cause of Action's indirect, reputation-based argument

Cause of Action appears to rely primarily on the effect of the litigation on Van Hollen's reputation. Citing FEC advisory opinion 1990-05, the Complaint argues that the principal question is "whether the activity in question conferred a recognizable benefit or value to the

candidate." Compl. ¶ 31. It then catalogues Van Hollen's statements in support of campaign finance reform, asserting that "[t]he *pro bono* legal services at issue in this matter, which furthered that policy initiative on Van Hollen's behalf, therefore must be seen for what they are: contributions." *Id.* ¶ 33. By this logic, anything that helps to associate a candidate with a particular policy issue is a campaign "contribution" under § 8(a)(i).

The Commission has squarely rejected Cause of Action's theory that any activity conferring an indirect, reputational benefit necessarily influences a federal election and thus constitutes a "contribution":

> [T]he Commission has recognized that even though certain appearances and activities by candidates may have election related aspects and may indirectly benefit their election campaigns, payments by non-political committee entities to finance such activity will not necessarily be deemed to be for the purpose of influencing an election.

AO 1983-12. Accordingly, the FEC has permitted a candidate to host a public-affairs radio program, cable show, live event, or seminar (e.g., AO 1996-45, 1994-15, 1992-05, 1981-37, 1977-42), to appear in television advertisements endorsing local candidates for office or fundraising for charitable organizations (AO 1982-56, 1978-88), to serve as chair of a political, charitable and issue advocacy organization (*e.g.*, AO 1978-56, 1978-15, 1977-54), and to speak at a college event or PAC fundraiser for an honorarium (*e.g.*, AO 1992-06, 1988-27)—all of which clearly enhance a candidate's reputation. In none of these cases was this benefit considered a basis for treating the underlying activity as a contribution. Thus, Cause of Action's reputation-based theory can be easily rejected as inconsistent with well-established, longstanding FEC practice.

Cause of Action's reliance on FEC advisory opinion 1990-05 is misplaced, given the entirely different set of facts addressed in that opinion. In 1990, self-publication of newsletters

and other media was an emerging trend and raised the possibility that candidates might seek to cloak a classic electioneering activity—pamphleteering—under the guise of press freedom. Notably, the Commission reaffirmed the principle that "indirect[] benefit" to a candidate is insufficient to establish a contribution, declining to find that any of the candidate's existing newsletters were election-related even though all of them presumably provided her with some beneficial exposure to her constituency. *See* AO 1990-05 (citing AO 1983-12). Instead, the Commission offered general guidelines for when a candidate's own press publications may cross the line into being election-related.

That guidance does not support finding election-related activity here. To begin, this case does not involve a candidate's self-publication; it relates to a lawsuit and an administrative proceeding. Instead of Van Hollen distributing the filings to his constituency in Maryland, his lawyers filed them in federal court and in an administrative agency. The audience was the federal judiciary and the Commission, not the Maryland electorate. Those filings also make no reference to Van Hollen's qualifications for public office or to his opponent and do not refer to his views on public policy issues (or those of his opponents). They mention Van Hollen's candidacy for office only in passing, in addressing the court's jurisdiction. FEC advisory opinion 1990-05 confirms that such an indirect benefit does not implicate § 8(a)(i).

2. Van Hollen's standing allegations do not change this analysis

Cause of Action's complaint also refers to certain allegations that Van Hollen included in his complaint for purposes of establishing standing to bring the underlying lawsuit in federal court. *See* Compl. ¶ 32 n.54. Such allegations, however, do not prove anything with respect to whether this litigation should be considered election-influencing activity for purposes of § 8(a)(i).

The inquiries—federal standing and § 8(a)(i)—are distinct. Standing to bring a suit in federal court relates to the *effect* or potential effect on the *plaintiff*, here Van Hollen. *See Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009) (describing the "personal stake" a plaintiff must demonstrate in the litigation, including that "he is under threat of suffering 'injury in fact' that is concrete and particularized"). Section 8(a)(i), by contrast, relates to the "*purpose*" of the *donor*. As discussed above, the Commission has rejected an effects-based inquiry to determine whether an activity is a contribution. Van Hollen's standing allegations simply do not bear on the contribution question under § 8(a)(i).

What is more, even if they were the same inquiry, Van Hollen's standing allegations would not suffice to establish a contribution. The two inquiries have very different thresholds. A federal plaintiff need not allege direct injury to establish standing. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).[7] For example, when Senator McConnell filed his complaint challenging BCRA, he (like Van Hollen) alleged that the BCRA would injure him in his capacity as a "member of Congress, candidate, voter, donor, recipient, fundraiser, and party member." Compl. ¶ 16, *McConnell v. FEC*, No. 02-cv-582, (D.D.C. Mar. 27, 2002), ECF No. 1.[8] That this allegation was sufficient to establish standing does not, absent more, establish a contribution under § 8(a)(i). As the Commission has expressly recognized, "activities [that] ... indirectly benefit ... election campaigns ... will not necessarily be deemed to be for the purpose of influencing an election." AO 1983-12.

[7] In *SCRAP*, the Supreme Court rejected an argument "to limit standing to those who have been 'significantly' affected by agency action" as "fundamentally misconceived." 412 U.S. at 689 n.14. It then catalogued "important interests [that it allowed] to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *Id.*

[8] Additionally, when Senator McConnell requested (and received) oral argument time in *McCutcheon v. FEC*, he asserted that he was harmed by the aggregate limit on individual contributions. *See* Motion Of Sen. Mitch McConnell For Leave To Participate In Oral Argument As Amicus Curiae And For Divided Oral Argument at 2, *McCutcheon v. FEC*, No. 12-536 (U.S. filed July 25, 2013) ("Now seeking re-election to his sixth term in the Senate, Senator McConnell is adversely impacted by the aggregate limit on individual contributions to candidates.").

Finally, even though Van Hollen alleged that the current campaign finance scheme causes him Article III injury, that allegation does not prove that the litigation was for the purpose of influencing a Federal election under § 8(a)(i). The litigation could not have provided Van Hollen with an electoral advantage over an opponent because Van Hollen's stated interest—"participating in elections untainted by expenditures from undisclosed sources for 'electioneering communications'" (Exhibit K, ¶ 11)—is shared by any candidate for Federal office. If the lawsuit were successful, *all* candidates would benefit from the ruling. Indeed, the allegations were drafted to comply with the D.C. Circuit's standing rules, which permit candidates to bring challenges to the illegal structuring of a competitive environment. *See Shays v. FEC*, 414 F.3d at 85. And, as explained above, such structural challenges are not for the purpose of influencing an election.[9]

3. A Contrary Ruling By The FEC Would Be Highly Disruptive

Cause of Action's complaint, if deemed valid, would call into question settled practices in the area of campaign finance litigation. As noted, there is a long history of members of Congress using pro bono legal services to challenge campaign finance laws and regulations. A ruling that such services are "contributions" would, in practical terms, eliminate this practice. The prohibitive cost of such legal work would make it highly unlikely that elected officials could challenge campaign finance laws and regulations. And the social cost would be to reduce the quality of legal representation in the important legal proceedings that shape how campaign-finance law develops in this country.

[9] Cause of Action also suggests, in a footnote, that Van Hollen violated the House ethics rules in accepting the pro bono legal services without establishing a legal expense fund. Compl. ¶ 23 b.34. The House Committee on Ethics has made clear, however, that House members may accept "pro bono legal assistance ... without limit" "[t]o participate in a civil action challenging the validity of any federal law or regulation." House Committee on Ethics, *Contributions To A Legal Expense Fund*, http://ethics.house.gov/contributions-legal-expense-fund (last visited May 9, 2016). In any event, the Commission does not have jurisdiction over the enforcement of congressional ethics rules.

Indeed, if adopted, the disruptive effect of Cause of Action's argument would extend far beyond pro bono legal representation. Accepting the indirect-benefit theory would permit complaints charging that any activity placing the candidate in a positive light is a "contribution"—which is effectively *everything* a candidate does. Not only would that cause a flood of FEC complaints, it would seriously imperil many socially beneficial activities in which federal officials engage. To consider just one example, such a ruling would call into question the routine practice of U.S. Senators and Members of Congress filing amicus briefs in the courts of appeals and the Supreme Court. Such pro bono amicus briefs are permitted by Congressional rules, but—under Cause of Action's theory of indirect benefit—they would be "contributions" under § 8(a)(i). If the Commission were to accept Cause of Action's theory, few members of Congress would ever offer their views, as amicus curiae, to any court in the country.

Worse yet, Cause of Action's indirect-benefit theory is entirely unworkable. There is no administrable standard to determine which indirect benefits are sufficient to convert an activity into a campaign contribution and which are not. And even were such a standard to exist, it would raise fundamental fairness concerns because it would rely on *ex post facto* decisionmaking; an activity could be deemed a "contribution" if, despite the donor's lack of intent at the time of the activity, many months later, it provides sufficient benefit to a federal candidate. The Commission should not accept Cause of Action's invitation to overrule its prior conclusion that indirect benefit is insufficient to establish a "contribution" under § 8(a)(i).

II. DEMOCRACY 21 AND CLC'S PRO BONO LEGAL SERVICES WERE NOT A "CONTRIBUTION" AS DEFINED UNDER § 8(A)(II) OF FECA

The Commission should reject Cause of Action's alternative argument (Compl. ¶ 29) that Democracy 21 and CLC provided a "contribution" to Van Hollen in the form of "payment by

any person of compensation for the personal services of another person which are rendered *to a political committee* without charge for any purpose." 52 U.S.C. § 30101(8)(A)(ii) (emphasis added; hereinafter "§ (8)(a)(ii)").

This argument suffers from a basic flaw. Democracy 21 and CLC provided pro bono legal services to Van Hollen personally, not to his political committee. *See* Exhibit K (complaint listing plaintiff as "Van Hollen," not "Committee To Elect Van Hollen"); *cf.* FEC AO 1988-27 (recognizing distinction between a payment "directly to the speaker ... and not to the speaker's election campaign"). Van Hollen himself was the only plaintiff in the lawsuit and petitioner in the rulemaking; his campaign committee was not a party and had no involvement in either proceeding. Because the underlying litigation and administrative petition were filed in Van Hollen's name, the pro bono legal services are not a contribution under § (8)(a)(ii).

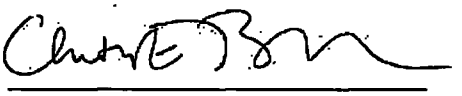
Moreover, in connection with the litigation and rulemaking, Democracy 21 and CLC worked only with Van Hollen personally and his House staff, not with his campaign staff. Exhibit I; Exhibit J. Indeed, Cause of Action's Complaint cites press releases issued by Representative Van Hollen's Congressional office, *not* his campaign committee. *See, e.g.*, Comp. ¶ 32 n.55. Cause of Action's conclusory allegation that Democracy 21 and CLC somehow contributed to Van Hollen's political committee provides no basis for the Commission to initiate an investigation.

CONCLUSION

For the foregoing reasons, the Commission should find no reason to believe that Democracy 21 and CLC violated FECA as alleged in MUR 7024 and should conclude that no further action should be taken in this matter.

May 9, 2016

Respectfully submitted,



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May 9, 2016

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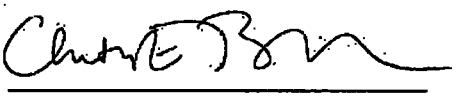

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C	Democracy 21 and Campaign Legal Center Comments on FEC's Notice of Proposed Rulemaking (NPRM) on "Electioneering Communications."
D	Democracy 21 and Campaign Legal Center Testimony on FEC's Notice of Proposed Rulemaking (NPRM) on "Electioneering Communications."
E	Democracy 21 Press Release (Apr. 21, 2011): "Van Hollen Lawsuit Challenges FEC Regulations as Contrary to Law and Responsible for Eviscerating Donor Disclosure."
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EXHIBIT A

Democracy 21

Our Mission

Democracy 21

Democracy 21 is a nonprofit, nonpar isan organization dedicated to making democracy work for all Americans.

Democracy 21, and its education arm, Democracy 21 Education Fund, work to eliminate he undue influence of big money in American politics, prevent government corruption, empower citizens in the political process and ensure the integrity and fairness of government decisions and elections. The organization promotes campaign finance reform and other related political reforms to accomplish these goals.

Our Focus

Democracy 21 provides the public and media with the latest informa ion and analysis on money and politics and campaign finance reform efforts. The organization's activities include:

Promoting campaign finance reforms, including the creation of a new public financing system for presidential and congressional races to empower citizens by providing multiple public funds to match their small contributions, ending secret money in federal elections by enacting new campaign finance disclosure laws, curbing the role of Super PACs in federal elections and creating a new system to effectively enforce the campaign finance laws;

Working to develop technological breakthroughs by which the internet and social media can be used to empower tens of millions of citizens to make small contributions online and fundamentally change the way campaigns are financed;

Bringing lawsuits and filing briefs to defend the constitutionality of the nation's campaign finance laws and to ensure the laws are effectively interpreted and enforced;

Participating in administrative proceedings and filing complaints to press administrative agencies and enforcement bodies to properly administer and enforce the laws;

Promoting other government integrity reform measures, including lobbying, ethics and transparency laws and rules; and

Serving as a watchdog to hold federal office holders accountable for viola ing campaign finance laws and ethics rules and for misusing public office for personal gain.

Our Funders

Our funders include the John D. and Catherine T. MacArthur Foundation, the Rockefeller Brothers Fund, the Opportunity Fund, FThree Foundation, the Open Society Founda ions and a number of committed individual donors.

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EXHIBIT B

History & Mission

Founded in 2002, the Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that defends and protects our democracy in the areas of campaign finance, voting rights, political communication and government ethics. CLC works every day to attack laws and regulations that undermine the fundamental rights of all Americans to participate in the political process and to defend laws that protect these interests. Working in administrative, legislative and legal proceedings, CLC shapes our nation's laws and policies so that the right to have a voice in our free and democratic society remains the foundation of our political system.

EXHIBIT C

October 1, 2007

By Electronic Mail (wrtl.ads@fec.gov)

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2007-16: Electioneering Communications

Dear Mr. Katwan:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters and U.S. PIRG in response to the Notice of Proposed Rulemaking (NPRM) on "Electioneering Communications." *See* NPRM 2007-16, 72 Fed. Reg. 50261 (August 31, 2007). The Commission requests comments on proposed revisions to its rules governing electioneering communications, in order to implement the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

WRTL II held that electioneering communications that are not express advocacy, or the "functional equivalent of express advocacy," *id.* at 2667, may not constitutionally be subject to the prohibition on the use of corporate and union treasury funds to pay for electioneering communications, a restriction imposed by Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), and codified at 2 U.S.C. §§ 441b(b)(2), 441b(c). Further, the plurality opinion said that an "ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II,* 127 S. Ct. at 2667.

The Commission is seeking public comment on two alternative proposed approaches to implementing the *WRTL II* decision – the first would incorporate the new exemption into the rules prohibiting the use of corporate and union treasury funds to pay for electioneering communications; the second would incorporate the new exemption into the rule defining "electioneering communication" itself. The principal difference between the two approaches is that the second would have the effect of exempting *WRTL II*-type ads not only from the corporate/union source restrictions at 2 U.S.C. § 441b(b)(2), but also from the electioneering communication disclosure requirements at 2 U.S.C. § 434(f). 72 Fed. Reg. at 50262.

For the reasons set forth below, we urge the Commission to promulgate a rule based on the "Alternative 1" approach, limiting the new exemption to the corporate/union funding

restrictions, and retaining the existing disclosure requirements for all ads that meet the statutory definition of "electioneering communication."

In addition to the "safe harbor" proposed by the Commission as part of "Alternative 1," the Commission should make clear in the rule that it will consider "indicia of express advocacy" in an ad, 127 S. Ct. at 2667, such as an attack on a candidate's character, qualifications or fitness for office, as a "red flag" and as strong evidence that the ad is subject to the Title II funding restrictions. Further, the Commission should make clear that it will consider "condemning" a candidate's record on an issue – so-called "Jane Doe"-type ads, as discussed both in *WRTL II,* 127 S. Ct. at 2667 n.6, and in *McConnell v. FEC,* 540 U.S. 93, 127 (2003) – also as strong evidence that the ad is subject to the Title II funding restrictions.

The Campaign Legal Center and Democracy 21 each request the opportunity to testify at the public hearing on this rulemaking scheduled for October 17, 2007.

I. The Commission Should Adopt "Alternative 1" And Reject The "Alternative 2" Proposal To Extend The *WRTL II* Exemption To BCRA's Reporting Requirements.

The NPRM correctly acknowledges that the "plaintiff in *WRTL II* challenged only BCRA's corporate and labor organization funding restrictions and did not contest either the definition of 'electioneering communication' in section 434(f)(3), or the reporting requirement in section 434(f)(1)." 72 Fed. Reg. at 50262 (*citing WRTL II,* 127 S. Ct. at 2658-59; *and* Verified Complaint for Declaratory and Injunctive Relief, ¶ 36 (July 28, 2004) in *Wisconsin Right to Life, Inc. v. FEC* (D.D.C. No. 04-1260)).

In the original complaint filed by Wisconsin Right to Life that led to the Supreme Court decision, the plaintiff could not have been clearer that it was not challenging the reporting and disclaimer provisions of the law: "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements." Complaint, *supra* at ¶ 36.

This is a point repeatedly stressed by WRTL in its brief to the Supreme Court. In the introductory section of the brief, it stated: "WRTL challenged the *prohibition*, not *disclosure*, and was prepared to provide the full disclosure required under BCRA." Brief for Appellee, *FEC. v. Wisconsin Right to Life,* No. 06-969 (March 2006) at 10 (emphasis in original); *see also id.* at n.18 ("Full disclosure of WRTL's identity and activities would have been forthcoming.") and *id.* at 29 n.39 ("WRTL did not challenge the electioneering communication *disclosure* requirements.") (emphasis in original). Indeed, WRTL stressed to the Court that its challenge to the statute, if successful, would leave a fully "transparent" system:

> Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimer and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for

> grassroots lobbying on a particular government issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, ... , the people, with full disclosure as to the messenger, can make the ultimate judgment.

Id. at 49.

The NPRM also correctly notes that the Supreme Court in *McConnell v. FEC,* 540 U.S. 93 (2003), "specifically upheld the electioneering communications reporting provisions as constitutional because they 'd[o] not prevent anyone from speaking[.]'" 72 Fed. Reg. 50262 (*quoting McConnell,* 540 U.S. at 201 (*quoting McConnell v. FEC,* 251 F. Supp. 2d 176, 241 (D.D.C. 2003)) (internal quotations omitted).[1] The *McConnell* Court upheld these disclosure provisions by a vote of 8-1, with only Justice Thomas dissenting.

Yet, despite the fact that the plaintiff in *WRTL II* did not challenge the constitutionality of the disclosure requirements applicable to electioneering communications, and despite the fact that the *WRTL II* Court did not address the constitutionality of these disclosure requirements, and despite the fact that the *McConnell* Court by a large majority specifically upheld the constitutionality of the Title II disclosure requirements – the Commission has proposed, as "Alternative 2," to amend the definition of "electioneering communication" at 11 C.F.R. § 100.29(c) so as to exempt many if not most electioneering communications from the disclosure requirements.

For the reasons set forth below, the Commission does not have any basis for adopting "Alternative 2."

A. Supreme Court's *WRTL II* holding that the "electioneering communication" funding restrictions are unconstitutional as applied to certain advertisements does not extend to the reporting requirements for "electioneering communications."

The Commission asks: "Does *WRTL II* either permit or necessitate an exemption from the definition of 'electioneering communication,' or give the Commission authority to create such an exemption?" 72 Fed. Reg. at 50263.

The answer to all those questions is no. As noted above, the Court's decision in *WRTL II* did not even consider, let alone invalidate, BCRA's definition of "electioneering communication" and related reporting requirements. And the Commission does not have

---

[1] *Also quoting Alaska Right To Life Comm. v. Miles,* 441 F.3d 773, 788 (9th Cir. 2006) ("The [*McConnell*] Court was not * * * explicit about the appropriate standard of scrutiny with respect to disclosure requirements. However, in addressing extensive reporting requirements applicable to * * * 'electioneering communications' * * *, the Court did not apply 'strict scrutiny' or require a 'compelling state interest.' Rather, the Court upheld the disclosure requirements as supported merely by 'important state interests.'") (internal quotation omitted); *Buckley* v. *Valeo,* 424 U.S. 1, 60-84 (1976) (upholding FECA's reporting requirements).

authority to exempt from the disclosure requirements any electioneering communications that promote, support, attack or oppose a candidate. *See* 2 U.S.C. § 434(f)(3)(B)(iv).

The Court in *WRTL II* reviewed the constitutionality of the Title II funding restrictions – not its disclosure requirement. Fundamentally different constitutional tests apply to the two provisions. Whereas a reporting requirement is constitutional so long as there is a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), a restriction on political spending is constitutional only if it meets the more rigorous strict scrutiny requirement of being "narrowly tailored to further a compelling interest," *WRTL II*, 127 S. Ct. at 2671 (*quoting McConnell*, 540 U.S. at 205; *Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 44-45).

Examining the source prohibition, and that provision alone, the Court in *WRTL II* applied this more rigorous standard. The *WRTL II* Court had no reason to, and indeed did not, consider whether the ads at issue in the case could constitutionally be subject to the disclosure requirements of Title II, under the less rigorous standard of review applicable to such reporting requirements.

Thus, this rulemaking is being conducted pursuant to a Supreme Court decision that did not examine or address the constitutionality of the Title II disclosure requirements, and did not make any ruling on those requirements. And if the Court had been presented the question, the standard it would have applied to assessing the Title II disclosure requirements clearly would have been markedly different than the standard it applied to reviewing the Title II funding restrictions.

The Commission should not speculate as to what the outcome might be of some possible future as-applied challenge that might (or might not) be someday brought against the disclosure requirements of Title II. Certainly there are no grounds, now, for the Commission to conclude that those disclosure requirements are unconstitutional. *WRTL II* provides no basis for the Commission to decide, by rule, that the statutory disclosure requirements of BCRA cannot apply to all electioneering communications.

This conclusion has even stronger force given that the Supreme Court in *McConnell*, with eight Justices agreeing, expressly upheld the Title II disclosure requirements, 540 U.S. at 194-200, a decision undisturbed (and unanalyzed) by *WRTL II*.

McConnell's analysis of disclosure has its roots directly in *Buckley*. There, the Court made clear that both the government interests supporting disclosure laws, as well as the burdens imposed on those required to comply with disclosure requirements, differ substantially from interests and burdens at issue in provisions that impose limits on contributions and expenditures.

The *Buckley* Court began by noting that "[u]nlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities." *Id.* at 64. The Court said that there must be a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be

disclosed." *Id.* This test is necessary, the Court reasoned, "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but it also found "that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66 (*quoting Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court continued:

> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.
>
> The disclosure requirements, as a general matter, directly serve substantial governmental interests.

Id. at 66-68 (footnotes omitted) (emphasis added).

With respect to the burdens imposed by disclosure requirements, the *Buckley* Court noted that "disclosure requirements – certainly in most applications – appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68 (footnotes omitted). On balance, the Court concluded that the "sufficiently important" government interests served by disclosure requirements justify the burdens imposed by them, and it rejected the claims that FECA's disclosure requirements were unconstitutional as applied to political committees and individuals. *Id.* at 60.

By reference to this analysis, the Court in *McConnell* rejected a challenge to the Title II disclosure requirements. 540 U.S. at 195. The Court:

> [A]gree[d] with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive

> electioneering restrictions – apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of "electioneering communications."

540 U.S. at 196 (footnote omitted) (emphasis added). The Court continued:

> Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). . . . Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. McConnell Br. at 44. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." 251 F.Supp.2d at 237.

540 U.S. at 196-97 (*quoting McConnell,* 251 F.Supp.2d at 237(emphasis added)).

Just as the *Buckley* Court had upheld earlier FECA disclosure requirements against constitutional challenge, the *McConnell* Court held that BCRA's disclosure requirements "are constitutional, in part, because they 'd[o] not prevent anyone from speaking.'" *Id.* at 201 (internal citation omitted).[2]

In his opinion concurring in this portion of the judgment, Justice Kennedy, joined by Justice Scalia and Chief Justice Rehnquist, stated that he "agree[s] with the Court's judgment upholding the disclosure provisions contained in § 201 of Title II, with one exception." *Id.* at 321.[3] Justice Kennedy stated that the section 201 disclosure requirement "does substantially relate" to the governmental interest in providing the electorate with information, which "assures its constitutionality." *Id.* (*citing id.* at 196).

In short, the Supreme Court has held that reporting requirements serve governmental interests broader than those served by restrictions on expenditures, and that disclosure

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[2] The Court in *McConnell* noted that persons subject to the disclosure requirement might avail themselves of an as-applied challenge if they could demonstrate that disclosure would subject them to a "reasonable probability" of "threats, harassment, and reprisals." *Id.* at 198-99 (*quoting Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 100 (1982)). It found no such demonstration was made in *McConnell, id.* at 199, nor was any such argument advanced in *WRTL II.*

[3] That exception is the requirement in section 202 of BCRA for "advance disclosure" of executory contracts to purchase airtime for electioneering communications to be run in the future.

requirements are less burdensome than restrictions on expenditures. For these reasons, the Court has employed entirely different legal standards when considering the constitutionality of reporting requirements, as compared to a ban on the use of corporate or union treasury funds to pay for expenditures. The Court's ruling in *WRTL II,* applying the more rigorous standard to the source prohibitions of Title II, neither addressed nor disturbed the Court's 8-1 ruling in *McConnell* which applied a different standard to uphold the disclosure provisions of Title II.[4]

B. The constitutionality of a disclosure requirement does not depend on the spender's use of "express advocacy" or its "functional equivalent."

The fact that the Title II disclosure requirement (1) was upheld as constitutional in *McConnell*, (2) was not challenged in *WRTL II*, and (3) would, if challenged, be subject to an entirely different legal standard than was the source prohibition at issue in *WRTL II*, alone makes clear that the Commission has no legal or policy basis for extending the *WRTL II* exemption to the electioneering communication disclosure requirement.

Nevertheless, some might argue that disclosure may not constitutionally be required by spenders who do not use "express advocacy" or its "functional equivalent" and, instead, engage in what they characterize as "grassroots lobbying." This is wrong, but in any event would be a judgment for the courts to make about a statute passed by Congress, not a judgment for the Commission to make on its own.

The constitutionality of a disclosure requirement does not depend on the spender's use of "express advocacy" or its "functional equivalent." Statutes requiring disclosure of lobbying expenditures, as well as expenditures for ballot measures, have been upheld by both the Supreme Court and lower federal courts.

The leading case on lobbyist disclosure, *U.S. v. Harriss*, 347 U.S. 612 (1954), considered the Federal Regulation of Lobbying Act, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat

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[4] For the reasons discussed above, *WRTL II* does not require the Commission to create an exemption to the definition of electioneering communication that would have impact beyond the section 441b(b) restrictions on the use of corporate and union treasury funds reviewed by the Court. Nor does the Commission have discretionary authority under subpart (iv) of 2 U.S.C.§ 434(f)(3)(B) (or on any other statutory basis) to create such an exemption to the definition of electioneering communication. Under that provision, the Commission may not exempt any electioneering communication that "promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." *Id.* (incorporating 2 U.S.C. § 431(20)(A)(iii)). Since this language from section 431(20) makes clear that the category of PASO ads is broader than "express advocacy" and its "functional equivalent," narrowing the definition of electioneering communications simply to express advocacy and its "functional equivalent" would necessarily exclude non-express advocacy ads which PASO a candidate. While such a narrowing construction is required by the plurality's decision for purposes of applying the section 441b(b)(2) restriction on the use of corporate and union treasury funds, it is not required for any other purpose, and would exceed the statutorily constrained scope of the Commission's discretionary authority.

of any legislation by Congress" to report information about their clients and their contributions and expenditures. *Id.* at 614 & n.1. To avoid finding this broadly-drafted Act unconstitutionally vague, the Supreme Court narrowed its application to lobbyists' "direct communication with members of Congress on pending or proposed federal legislation[,]" and to such efforts made "through an artificially stimulated letter campaign."[5] *Id.* at 620; *see also id.* at 620 n.10 (noting that the Act covered lobbyists' "initiat[ion] of propaganda from all over the country, in the form of letters and telegrams," to influence legislators). After balancing the Act's burden on First Amendment rights against the government's interests, the Court found that disclosure of "lobbying," thus defined, did not violate the First Amendment. It reasoned that disclosure served the state interest of "self-protection," and enabled legislators to evaluate lobbying pressures by providing "a modicum of information from those who, for hire, attempt to influence legislation, or who collect or spend funds for that purpose." *Id.* at 625. The Court said:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad [lobbying] pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

Id.

Lower courts, following *Harriss*, have also upheld state lobbying disclosure statutes. In *Minnesota State Ethical Practices Board (MSEPB) v. Nat'l Rifle Association*, 761 F.2d 509 (8th Cir. 1985), the Eighth Circuit upheld a state statute requiring disclosure of grassroots lobbying, even when the activity at issue was only correspondence from a national organization to its own members. The NRA had sent three letters and one mailgram from its Washington headquarters to its members in Minnesota (approximately 54,000 persons), urging them to contact their state legislators in support of three pieces of pending legislation. *Id.* at 511. The Court found that Minnesota's interest in the disclosure of these activities "outweigh[ed] any infringement of the [NRA's] first amendment rights." *Id.* at 512.[6]

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[5] For instance, one of the lobbyist-defendants had "arranged to have members of Congress contacted" about legislation that would raise the price of agricultural commodities and commodity futures "through an artificially stimulated letter campaign." *Harriss*, 347 U.S. at 616-17.

[6] The Eighth Circuit reiterated this holding in *Minnesota Citizens Concerned for Life v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005), stating, "Both the Supreme Court and this court have upheld lobbyist-disclosure statutes based on the government's 'compelling' interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption." *See also Commission on Independent Colleges and Universities v. New York Temporary State Commission*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (finding the New York state lobby law, construed to require disclosure of efforts to "exhort the public to make such direct contact with legislators as outlined in *Harriss*," did not violate the First Amendment). *Cf. Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460-61 (11th Cir. 1996) (citing *Harriss* in upholding a Florida law which required

The electioneering communication disclosure provisions of Title II are far narrower than those upheld in *Harriss* and *MSEPB*. Whereas the Title II disclosure requirements apply only to certain broadcast communications aired in close proximity to elections, the disclosure requirements upheld in *Harriss* and *MSEPB* apply to both broadcast and non-broadcast communications, and apply regardless of when the communication was made.

Similarly, the Supreme Court has expressed approval of state statutes requiring the disclosure of funds spent on so-called issue advocacy in the context of ballot measures. In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on expenditures to influence ballot measures, but did so in part because "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. Citing *Buckley* and *Harriss*, the Court took note of "the prophylactic effect of requiring that the source of communication be disclosed." *Id.*

The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to committees formed to support or oppose ballot measures. Although the Court struck down the contribution limit, it based this holding in part on the availability of disclosure requirements imposed on ballot measure committees. *See* 454 U.S. at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting."); *see also Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 167 (2002) (invalidating ordinance requiring registration of door-to-door canvassers but noting that disclosure requirements "may well be justified in some situations – for example, by the special state interest in protecting the integrity of the ballot initiative process....").[7]

These precedents led the Ninth Circuit to hold that, "[g]iven the Supreme Court's repeated pronouncements, we think there can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003). The Ninth Circuit noted that "[t]hough the *Buckley* Court discussed the value of disclosure for candidate elections, the same considerations apply just as forcefully, if not more so, for voter-decided ballot measures." *Id.* at 1105; *see also Rhode Island ACLU v. Begin*, 431 F. Supp. 2d. 227, 243 (D.R.I. 2006) (upholding state law disclosure requirement that "is closely drawn to further a sufficiently important state interest in providing

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disclosure of expenditures both for direct lobbying and for indirect lobbying activities which did not involve contact with governmental officials).

[7] *McIntyre v. Ohio Election Comm.*, 514 U.S. 334 (1995), is not to the contrary. There, the Court struck down a state law identification requirement for political advertising, as applied to a pamphlet produced and disseminated by an individual. That case did not concern reporting requirements, and indeed the Court specifically distinguished such requirements, noting that they are a "far cry" from the identification law at issue in *McIntyre*. 514 U.S. at 355.

voters with information regarding the sources of funds used to support or oppose ballot measures.").[8]

Whether viewed in the context of lobby disclosure laws, or ballot measure disclosure requirements, federal case law confirms that the entire universe of advertisements captured by BCRA's definition of "electioneering communication" – those ads considered the functional equivalent of express advocacy, those that may promote or attack a candidate even if not the equivalent of express advocacy, as well as those that might be characterized as "grassroots lobbying" or "issue" advocacy – may constitutionally be subject to disclosure requirements. The Supreme Court and lower federal courts have upheld broader statutes requiring such disclosure, finding them justified by sufficiently important state informational interests.

II. "Alternative 1" Correctly Implements The Supreme Court's Decision In *WRTL II*, Provided It Is Modified To Make Clear That "Indicia Of Express Advocacy" And "Condemning" A Candidate's Record On An Issue ("Jane Doe"-Type Ads) Will Constitute Strong "Red Flag" Evidence That The Ads Are Subject To The Funding Restrictions Of Title II.

The Commission's "Alternative 1" proposal to incorporate a new exemption into Part 114 of the Commission's regulations appropriately limits the scope of the *WRTL II* exemption to BCRA's restrictions on corporate and labor organization funding of electioneering communications. Thus, under "Alternative 1," corporations and labor organizations would be permitted to use general treasury funds for electioneering communications that qualify for the proposed exemption, but would be required to file electioneering communications disclosure reports if their spending for such communications exceeds $10,000 in a calendar year. *See* 72 Fed. Reg. at 50262.

As discussed in greater detail below, it is important for the Commission to be clear in the rule that "indicia of express advocacy" in an ad – such as attacks on a candidate's character, qualifications or fitness for office – will provide strong evidence that the ad is subject to the funding restrictions of Title II. Similarly, the Commission should make clear that "condemning" a candidate's record on an issue – what the plurality opinion called "Jane Doe"-type ads – will also provide strong evidence that the ad is subject to the funding restrictions of Title II.

Subsection (a) of proposed new 11 C.F.R. § 114.15 provides that "[c]orporations and labor organizations may make an electioneering communication . . . if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." Subsection (b) establishes safe harbors for certain types of electioneering communication (*i.e.*, "grassroots lobbying" and "commercial and business

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[8] In *Getman,* the Ninth Circuit analogized spending on a ballot measure with lobbying, thus invoking the *Harriss* rationale for disclosure. It noted that voters act as legislators in the ballot measure context, and that interest groups and individuals attempting to influence voters thus act as lobbyists. "We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists' services and how much." 328 F.3d at 1106 (citing *Harriss,* 347 U.S. at 625).

advertisements") that meet specific requirements. Subsection (c) makes clear that electioneering communications qualifying for this exemption are nevertheless subject to the Title II reporting requirements.

We support the language of the general exemption set forth in proposed subpart (a). This subsection implements the Supreme Court's conclusion that an electioneering communication which is not the "functional equivalent" of express advocacy is exempt from the Title II source prohibition, and it mirrors the plurality opinion's language in defining the "functional equivalent" test.

This umbrella exemption, in itself, would be sufficient to implement the *WRTL II* decision. The Commission correctly recognizes that in "determining whether a particular communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate, the Commission may consider 'basic background information that may be necessary to put an ad in context.'" 72 Fed. Reg. at 50264 (*quoting WRTL II*, 127 S. Ct. at 2669). Under *WRTL II,* this information could include whether a communication "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." 72 Fed. Reg. 50264 (*quoting WRTL II*, 127 S. Ct. at 2669).

Although it is not required by the decision, we think it is reasonable for the Commission to provide additional guidance as to the contours of the umbrella exemption. Such guidance, however, must include both what is covered by the exemption, as well as what is not covered. The "safe harbor" in proposed subsection (b)(1) for "grassroots lobbying communications" is appropriate guidance on what ads are included in the exemption, in that it provides protection for ads that share all of the same essential characteristics as the ads held exempt in *WRTL II,* provided the Commission also makes clear that "Jane Doe"-type ads are not eligible for the "safe harbor." *See* n.9, *infra.* But this is not the only appropriate guidance the Commission needs to provide; the rule must also include guidance as to what ads are not covered by the exemption as well.

The plurality opinion described the ads at issue in *WRTL II* by pointing to a list of attributes:

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL II, 127 S. Ct. at 2667.[9] The controlling opinion said that because the WRTL ads had these characteristics – and pointed specifically to all of these characteristics – those ads were

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[9] The plurality opinion noted an additional characteristic of the WRTL ads: it said that the WRTL ads were distinguishable from "Jane Doe"-type ads – ads that "condemned" a candidate's "record on a particular issue." 127 S. Ct. at 2667 n.6. The plurality said the WRTL ads "do not do so."

"plainly not the functional equivalent of express advocacy." *Id.* In light of that analysis, other ads which similarly share all of these characteristics may fairly be assumed to fall within the umbrella exemption as well (and thus can fairly be included within a "safe harbor").[10]

The Commission asks "whether a showing that the communication meets all four prongs (and all elements of each prong) should be required to come within the safe harbor." 72 Fed. Reg. at 50265. We strongly believe that it should. The Commission should adhere closely to the fact pattern of *WRTL II* in crafting a *per se* "safe harbor" exemption, and for that reason should make clear that "Jane Doe"-type ads are not eligible for the safe harbor, since the plurality opinion drew a distinction between the WRTL ads and the so-called "Jane Doe"-type ads. *See* n.9, *supra.* Of course, the failure to fall within the safe harbor does not mean an ad could not still be exempt under the governing "functional equivalent" test that would be codified by proposed section 114.15(a). Even if one or more prongs of the safe harbor test are not met, an ad may still qualify for the umbrella exemption. (The NPRM itself notes this point: "[A] communication that does not qualify for either of the safe harbors may still come within the general exemption...." 72 Fed. Reg. at 50264).

The Commission notes several limitations of its proposed "grassroots lobbying" safe harbor (*e.g.*, communications discussing a candidate who is not an officeholder would not come within the proposed "grassroots lobbying" safe harbor), and asks whether the safe harbor should be "so limited" or, instead, should be expanded in a variety of ways. 72 Fed. Reg. at 50265. We agree with the limitations and urge the Commission to reject any expansion of the safe harbor as proposed in the NPRM.

Again, the safe harbor deals only with ads that are *per se* exempt, and the failure to expand the safe harbor does not constrict of the scope of the umbrella exemption. Ads that do not fall within the proposed safe harbor might nonetheless be within the scope of the umbrella exemption.

Just as the Commission proposes for the sake of clarity to provide a safe harbor as to the types of ads that are covered by the umbrella exemption, it should also provide guidance as to the characteristics of ads that will constitute strong evidence that such ads are not covered by the exemption and thus remain subject to the funding restrictions of Title II.

The Commission asks whether "there any factors that could support a conclusion that a communication is *per se* the functional equivalent of express advocacy[.]" 72 Fed. Reg. at 20265. The answer is that there are factors that should raise a "red flag" and be viewed as providing strong evidence that an ad is subject to the Title II funding restrictions – and those factors were identified by the plurality opinion itself, which deemed certain characteristics of an ad to be "indicia of express advocacy," *WRTL II,* 127 S. Ct. at 2667. These factors also

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Id. Thus, ads which "condemn" (or praise) a candidate's record on a particular issue should be expressly excluded from the safe harbor.

[10] Subsection (b)(2) would establish a safe harbor for certain commercial and business advertisements – advertisements of a sort not at issue in *WRTL II.* We do not object to this proposed safe harbor.

include the kind of "condemnation" of a candidate's record that characterizes the "Jane Doe"-type ads discussed by the plurality opinion, and which that opinion distinguished from the WRTL ads at issue in the case. *Id.* at n.6.

It is in part precisely because the ads at issue in *WRTL II* did not contain these "indicia of express advocacy" that the plurality opinion deemed those ads to be entitled to a constitutional exemption. By the same reasoning, if an ad does contain "indicia of express advocacy," the regulations should state that those indicia provide strong evidence in favor of treating the ad as the equivalent of express advocacy, and accordingly as subject to the Title II funding restrictions. There is a reason that the plurality opinion spelled out what constitutes "indicia of express advocacy." The Commission should give effective meaning to the list of such indicia, just as it proposes to give meaning to the indicia of what is a "genuine issue ad." *Id.* Thus, we strongly urge the Commission to make clear in the new rule that the fact that a communication:

- mentions an election, candidacy, political party, or challenger; or that it
- takes a position on a candidate's character, qualifications or fitness for office;

will constitute strong evidence that the ad is the functional equivalent of express advocacy within the meaning of the *WRTL II* decision and therefore is ineligible for the general exemption that would be established by proposed subsection (a).[11]

[11] The recent enforcement actions against various section 527 groups provide examples of ads that attack a candidate's "character." In the February, 2007 conciliation agreement with Progress for America Voter Fund, *see In re* Progress for America Voter Fund (MUR 5487) (Feb. 28, 2007) *available at* http://eqs.sdrdc.com/eqsdocs/00005AA7.pdf, the Commission cited an ad which praised the character of President Bush:

> Why do we fight? Years of defense and intelligence cuts left us vulnerable. We fight now because America is under attack. Positions are clear. A president, who fights to defeat terrorists before they can attack again. Or the nation's most liberal senator with a 30-year record of supporting defense and intelligence cuts. The war is against terror. And President Bush has the strength and courage to lead us to victory.
> Progress for America Voter Fund is responsible for the content of this ad.

The Commission found this ad to be express advocacy. Conciliation Agreement at ¶¶ 27-28.

An ad cited by the Commission in its conciliation agreement with Swiftboat Veterans and POWs for Truth ("SwiftVets"), *see In re* Swiftboat Veterans and POWs for Truth Conciliation Agreement (MURs 5511 and 5525) (Dec. 13, 2006) *available at* http://eqs.nictusa.com/eqsdocs/000058ED.pdf, directly criticized the "character" of Senator John Kerry:

> How can you expect our sons and daughters to follow you, when you condemned this [sic] fathers and grandfathers?
>
> Why is this relevant?
>
> Because character and honor matter. Especially in a time of war.

The Commission correctly notes that "if a communication discusses an officeholder's past position on an issue in a way that implicates the officeholder's character, qualifications, or fitness for office," then the communication would not be eligible for exemption under the "grassroots lobbying" safe harbor. 72 Fed. Reg. at 50266. These same factors should also be treated as providing strong evidence that the communication is not eligible for the umbrella exemption as well, and is therefore subject to the Title II funding restrictions.

Similarly, the Commission needs to make clear in the regulation that the *WRTL II* decision provides no "safe harbor" exemption for a class of ads which the plurality opinion refers to as the "'Jane Doe' example identified in *McConnell.*" 127 S. Ct. at 2667 n.6. These ads, as described by the plurality, are ones that "condemn[]" a candidate's "record on a particular issue." *Id.* The plurality opinion explicitly distinguished the WRTL ads from this kind of "Jane Doe" ad, on the basis that the WRTL ads "do not" condemn Senator Feingold's position on the filibuster issue; instead, they "take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position." *Id.* Indeed, "one would not even know from the ads whether Senator Feingold supported or opposed the filibuster." *Id.*

By making this explicit distinction between the WRTL ads and the "Jane Doe" ad, the plurality opinion leaves in place the ruling in *McConnell* regarding such "Jane Doe"-type ads. For this reason, language in an ad "condemning" a candidate's record on an issue should be treated as strong evidence that the ad is not eligible for the umbrella exemption and is thus subject to the Title II funding restrictions.

Finally, with respect to the "grassroots lobbying" safe harbor, the Commission provides numerous examples of communications that would, and would not, qualify for the safe harbor exemption. We agree with the Commission's conclusions regarding the applicability of the safe harbor to Examples 1, 2 and 3. Example 4 should be deemed not to come within the proposed safe harbor, because it attacks a candidate's character, qualifications, and fitness for office. Example 5 should be deemed not to come within the proposed safe harbor because it mentions the candidacies of two individuals. Example 6 should be deemed not to come within the proposed safe harbor because it takes a position on a candidate's character, qualifications and fitness for office. Example 7 should likewise be deemed not to come within the proposed safe harbor because it mentions the candidacy of an individual for federal office and takes a position on that candidate's character, qualifications and fitness for office.

John Kerry cannot be trusted.

Conciliation Agreement at ¶ 15. The Commission concluded that this ad is express advocacy. *Id.* at ¶ 25. To the same effect, the Commission cited a mailer which claimed Kerry "lied to the American people," "betrayed his fellow soldiers," and "lost the respect of the mean he served with," and which concluded by stating, "We're not debating Vietnam, it's about John Kerry's character, he betrayed us in the past, how do we know he won't do it again?" *Id.* at ¶ 16. The Commission also concluded this mailer contained express advocacy. *Id.* at ¶ 26.

III. Proposed Revisions To 11 C.F.R. § 104.20 Would Adequately Facilitate Reporting Of Payments For Electioneering Communication Permissible Under Proposed 11 C.F.R. § 114.15.

The Commission is proposing to revise its Title II disclosure regulations to facilitate disclosure by corporations and labor organizations permitted to make payments for electioneering communication under proposed 11 C.F.R. § 114.15. *See* 72 Fed. Reg. 50271.

The Commission proposes to amend its regulations to allow corporations and labor organizations, like other persons, to establish segregated accounts for the purpose of making payments for electioneering communications. The names of addresses of each donor of $1,000 or more to such segregated accounts must be reported. Where electioneering communications are not funded out of a segregated account, current regulations require the name and address of every donor of $1,000 or more to the person making the electioneering communication be reported. 11 C.F.R. § 104.20(c)(8). The Commission notes that it is "not proposing revisions to paragraph (c)(8), which provides for the reporting of 'donors' when electioneering communications are not made using a segregated bank account." 72 Fed. Reg. 50271.

The Commission asks, however, how a corporation or labor organization would report an electioneering communication funded with general treasury funds, and not funded out of a segregated account established for that purpose. 72 Fed. Reg. at 50271.

It is clear that a corporation or labor organization should be required to report the name and address of each donor who donates $1,000 or more to a segregated account that is established for the purpose of making electioneering communications. If a corporation or labor organization does not use a segregated account to pay for electioneering communications, it should be required to disclose the name and address of all of its donors of $1,000 or more. In each case, furthermore, the total amount of the donation should be reported. These rules, for instance, would apply to an advocacy group organized as a corporation, and that accepts donations. In the situation where a corporation receives no donations or contributions, and pays for an electioneering communication out of general treasury funds consisting of income from business activities, it would simply report that the corporation itself was the source of the funds.

IV. The *WRTL II* Holding Reinforces The Constitutionality Of 11 C.F.R. § 100.22(b).

In addition to addressing the "electioneering communication" issues raised by the *WRTL II* decision, the NPRM asks whether *WRTL II* "also provide[s] guidance regarding the constitutional reach of other provisions in the Act?" 72 Fed. Reg. 50263. The Commission correctly notes that the *WRTL II* "Court's equating of the 'functional equivalent of express advocacy' with communications that are 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate' bears considerable resemblance to components of the Commission's definition of express advocacy" at 11 CFR § 100.22. *Id.*

We agree with this. Subsection (a) of 100.22 defines "expressly advocating" to include communications that "can have no other reasonable meaning than to urge the election or defeat" of a candidate, while subsection (b) defines the phrase to include communication that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat" of a candidate. The NPRM asks whether "*WRTL II* require[s] the Commission to revise or repeal any portion of its definition of express advocacy at section 100.22[.]" 72 Fed. Reg. at 50263.

It does not. The Commission should not revise or repeal any portion of its subpart (b) regulation. To the contrary, the *WRTL II* opinion considerably strengthens the argument that the Commission's subpart (b) standard is constitutional.

That standard has been invalidated in a handful of lower court decisions, primarily on the ground that it is unconstitutionally vague. *See e.g., Maine Right to Life Comm., Inc. v. Fed. Election Comm'n*, 98 F.3d 1 (1st Cir. 1996) (*per curiam*) (adopting district court opinion); *see also Fed. Election Comm'n v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996) (*per curiam*) (adopting district court opinion).

Yet, the subpart (b) standard and the *WRTL II* test are virtually indistinguishable: the former based on a "could only be interpreted by a reasonable person" standard, and the latter based on a "susceptible of no reasonable interpretation other than" test.

If the *WRTL II* test – crafted by the Chief Justice's plurality opinion itself – is not unconstitutionally vague, then neither is the virtually identical subpart (b) test. Given the striking similarities between the two standards, the Court's embrace of a "susceptible of no reasonable interpretation" standard for defining the "functional equivalent of express advocacy" serves as a *de facto* endorsement of the constitutionality of subpart (b)'s "could only be interpreted by a reasonable person" standard.

The plurality opinion in *WRTL II* described its test as being "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *WRTL II*, 127 S. Ct. at 2666. As if to stress this point, the plurality opinion specifically defends the test it sets forth against Justice Scalia's attack on its vagueness. *Id.* at 2669 n.7. The footnote points out that the "no reasonable interpretation" standard satisfies the "imperative for clarity in this area." The footnote also argues that the "magic words" formulation of express advocacy used in *Buckley* was not "the constitutional standard for clarity ... in the abstract, divorced from specific statutory language," and that the *Buckley* "magic words" standard was a matter of statutory construction and "does not dictate a constitutional test." *Id.*[12]

[12] We take note of the fact that the plurality opinion also says that its test "is only triggered if the speech meets the bright-line requirements of BCRA § 203 in the first place." *Id.* As a descriptive matter, this is of course true: a limiting construction that narrows the scope of those "electioneering communications" that are subject to the corporate and union funding ban is itself necessarily subject to the underlying time frame limitations on the statutory definition of "electioneering communications." Thus, it is correct that the plurality's test applies only in the 30/60 day Title II period. This truism, however, does not in any way address the concern about whether the plurality's limiting construction is,

In recent months, the Commission has been applying the section 100.22 standards of express advocacy, including its subpart (b) test, in the context of its enforcement actions regarding the "political committee" status of organizations active in the 2004 elections, a test that in part turns on whether such organizations made "expenditures" for express advocacy. The *WRTL II* decision affirms that Commission has been on solid legal ground in its reliance on subpart (b).

These enforcement actions also provide illustrations of how the Commission has been applying subpart (b), and therefore they provide important guidance on how the Commission should apply the closely related *WRTL II* standard. For instance, in its December 2006 conciliation agreement with Swiftboat Veterans and POWs for Truth ("SwiftVets"), *see In re* Swiftboat Veterans and POWs for Truth Conciliation Agreement (MURs 5511 and 5525) (Dec. 13, 2006),[13] the Commission cited the following ads as containing subpart (b) express advocacy:

> Friends
>
> Even before Jane Fonda went to Hanoi to meet with the enemy and mock America, John Kerry secretly met with enemy leaders in Paris.
> ...
> Eventually, Jane Fonda apologized for her activities, but John Kerry refused to.
>
> In a time of war, can America trust a man who betrayed his country?
>
> Any Questions?
>
> John Kerry has not been honest.
>
> And he lacks the capacity to lead.
>
> When the chips are down, you could not count on John Kerry.
> ...
> I served with John Kerry...John Kerry cannot be trusted.

---

or is not, vague. After all, if – as the plurality opinion concludes – the "susceptible of no reasonable interpretation" test is not vague, that is as true outside the time frame as it is inside that period. Furthermore, the fact that the plurality opinion says that the test applies only in the Title II period does not create a negative implication that this test, or a similar test, cannot be used outside that period.

This snippet of the opinion, however, may be used by some, incorrectly, to argue that the subpart (b) standard cannot be applied outside the Title II timeframe. In our view, that would be a gross over-reading of the plurality's passing statement which, after all, is no more than one sentence of dictum in a footnote and is presented only as the fifth of five reasons to rebut an argument made by another Justice. That hardly should be taken as a negative ruling on the constitutionality of the Commission's longstanding subpart (b) regulation that was not even before the Court.

[13] *Available at* http://eqs.nictusa.com/eqsdocs/000058ED.pdf.

Never Forget (a/k/a Other Hand)

John Kerry gave aide [sic] and comfort to the enemy by advocating their negotiating points to our government.

Why is it relevant? Because John Kerry is asking us to trust him.

I will never forget John Kerry's testimony. If we couldn't trust John Kerry Then, how could we possibly trust him now?

Id. at ¶ 15. The Commission concluded that these ads, and other similar ones,

[E]xplicitly challenge Senator Kerry's 'capacity to lead,' assert that he cannot be 'trusted,' and ask why citizens should be willing to 'follow' him as a leader. The Commission concludes that, speaking to voters in this context, the advertisements unambiguously refer to Senator Kerry as a Presidential candidate by discussing his character, fitness for office, and capacity to lead, and have no other reasonable meaning than to encourage actions to defeat him. *See* 11 C.F.R. § 100.22(b).

Id. at ¶ 25. The Commission also cited two mailers sent by SwiftVets. One read:

Why is John Kerry's Betrayal Relevant Today? Because character and trust are essential to leadership, especially in time of war. A man who so grossly distorts his military record, who betrays his fellow soldiers, who endangers our soldiers and sailors held captive, who secretly conspires with the enemy, who so brazenly mocks the symbols of sacrifice of our servicemen...all for his own personal political goals...has neither the character nor the trust for such leadership. JOHN KERRY CANNOT BE TRUSTED. If we couldn't trust John Kerry then, how could we possibly trust him now?

Id. at ¶ 16. Of this mailer (and another similar one), the Commission said:

Both mailers comment on Kerry's character, qualifications and accomplishments and the Commission concludes that, in context, they have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Senator Kerry, the recipient is told, lacks an essential requirement to lead in a time of war – he "cannot be trusted" and is "unfit for command." Thus the Commission concludes that the only manner in which the reader can act on the message that "Kerry cannot be trusted" is to vote against him in the upcoming election. *See* 11 C.F.R. § 100.22(b).

Id. at ¶26.

A November 2006 conciliation agreement with Sierra Club, Inc., *see In re* Sierra Club Conciliation Agreement (MUR 5634) (Nov. 15, 2006),[14] provides further examples of subpart (b) express advocacy. There, the Commission cited a pamphlet published by the Sierra Club shortly before the 2004 election:

> The "Conscience" pamphlet prominently exhorts the reader to "LET YOUR CONSCIENCE BE YOUR GUIDE ...," accompanied by pictures of gushing water, picturesque skies, abundant forests, and people enjoying nature. The headline of the interior of the pamphlet exhorts the reader, "AND LET YOUR VOTE BE YOUR VOICE" (Emphasis in the original).
>
> Underneath that exhortation, the pamphlet compares the environmental records of President Bush and Senator John Kerry and U.S. Senate candidates Mel Martinez and Betty Castor through checkmarks and written narratives. For example, in the category of "Toxic Waste Cleanup," it describes Senator Kerry as a "leader on cleaning up toxic waste sites" and states he co-sponsored legislation that would unburden taxpayers and "hold polluting companies responsible for paying to clean up, abandoned toxic waste sites." In contrast, the description of President Bush's record on the same subject says "President Bush has refused to support the 'polluter pays' principle, which would require corporations to fund the cleanup of abandoned toxic waste sites, including the 51 in Florida. Instead, he has required ordinary taxpayers to shoulder the cleanup costs." Similarly, under the subject of "Clean Air," Senator Kerry is described "support[ing] an amendment that would block President Bush's change to weaken the Clean Air Act," and as co-sponsoring legislation "which would force old, polluting power plants to clean up." In contrast, President Bush's position on "Clean Air'' is described as "weakening the law that requires power plants and other factories to install modem pollution controls when their plants are changed in ways that increase pollution." In each of three categories, the pamphlet assigns a "checkmark symbol" in one or two boxes next to either one or both candidates; of the two candidates, only Senator Kerry receives checkmarks in every box in all three categories (Toxic Waste Cleanup, Clean Air, and Clean Water), whereas President Bush receives only one checkmark in a single category (Clean Air), and in that category, there are two checkmarks for Senator Kerry.

Id. at ¶¶ 8-9. The Commission concluded this pamphlet constituted subpart (b) express advocacy:

> The Commission concludes that the "Conscience" pamphlet ... was unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to whether the pamphlet encourages readers to vote for Senator Kerry and Betty Castor or encouraged some other kind of action. *See* 11 C.F.R. § 100.22(b). Accordingly, the Commission

[14] *Available at* http://eqs.nictusa.com/eqsdocs/00005815.pdf.

> concludes that the "Conscience" pamphlet expressly advocated the election of clearly identified candidates.

Id. at ¶ 11.

In light of the *WRTL II* Court's *de facto* affirmation that 11 C.F.R. § 100.22(b) is not unconstitutionally vague, we believe the Commission should continue to apply this standard when determining whether a person has made communications "expressly advocating" a candidate's election or defeat. The Commission should reject any suggestion that the subpart (b) standard should be repealed.

Given that the *WRTL II* test and the subpart (b) definition of "expressly advocating" are virtually identical, the source restrictions of Title II now prohibit only corporate and union spending for "electioneering communications" that would already be prohibited by the section 441b prohibition on corporate or union spending of treasury funds for "independent expenditures," defined to include express advocacy under section 100.22 of the Commission's regulations. In light of this, the Commission asks whether "these coextensive definitions leave any independent meaning to the electioneering communications reporting requirements." 72 Fed. Reg. at 50263.

The answer is that they do, because, as discussed above, the *WRTL II* "functional equivalent" test does not apply to the Title II reporting requirements. All communications meeting the statutory definition of "electioneering communication" should remain subject to BCRA's reporting requirements. Thus, BCRA's Title II disclosure requirements continue to have extremely important independent meaning, and to apply to all electioneering communications, regardless of whether they constitute the functional equivalent of express advocacy.

The Commission further asks whether "this combination of definitions [would] . . . rob the electioneering communication prohibition in section 441b(b)(2) (and proposed new 11 CFR 114.15) of independent significance by construing the corporate expenditure prohibition as coextensive with the corporate electioneering communications prohibition[.]" 72 Fed. Reg. at 50263.

This is not the case because, as noted above, the subpart (b) standard has been invalidated by some lower federal courts and is thus currently inapplicable in certain jurisdictions. Because of the Commission's inability to enforce subpart (b) in these jurisdictions, the corporation/labor organization electioneering communication restrictions established by 2 U.S.C. § 441(b)(2), even as narrowed by *WRTL II,* continue to have independent significance in those jurisdictions. Further, because the future of subpart (b), and the Commission's application of it, are not permanently resolved, notwithstanding the *de facto* approval of it in *WRTL II,* the Commission should retain both standards.

For all of these reasons, we urge the Commission not to revise or repeal any portion of its definition of express advocacy at section 100.22.

V. Conclusion

We urge the Commission to promulgate a rule reflecting the "Alternative 1" approach, with the important modifications described above, limiting the new *WRTL II* exemption to the corporate/union funding restrictions imposed by Title II, and retaining the existing disclosure requirements for all ads that meet the statutory definition of "electioneering communication." We also urge the Commission not to revise or repeal any portion of its definition of express advocacy at section 100.22.

We appreciate the opportunity to submit these comments.

Respectfully,

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EXHIBIT D

UNITED STATES FEDERAL ELECTION COMMISSION

In the matter of:

ELECTIONEERING COMMUNICATIONS

NOTICE 2007-16

Washington, D.C.

Wednesday, October 17, 2007

PARTICIPANTS:
Panel 1
JAMES BOPP
MARC ELIAS
ALLISON HAYWARD
Panel 2
DONALD SIMON
LAWRENCE GOLD
JAN BARAN
Panel 3
PAUL RYAN
JESSICA ROBINSON

P R O C E E D I N G S

(10:00 a.m.)

CHAIRMAN LENHARD: I'd like to open the hearing of the Federal Election Commission for Wednesday, October 17, 2007, on electioneering communications.

We will begin by welcoming everyone. This is the first day of two days of the Commission's hearings on how we should implement the Supreme Court's decision in FEC versus Wisconsin Right to Life.

The FEC published a notice of proposed rulemaking on electioneering communications in the Federal Register on August 31, 2007, and asked for comments on two versions of the proposed rule to implement the Supreme Court's decision.

The first alternative would create an exemption to the corporate and labor organization funding restrictions for electioneering communications in Part 114 of our regulations.

The second alternative would create an exemption to the definition of electioneering communications in Section 100.29 of our regulations.

The NPRM also raised a number of other issues for public comment regarding the effect of the Wisconsin Right to Life decision on our regulations including whether we should amend our definition of express advocacy in Section 100.22 of our regulation in light of the Supreme Court's decision.

I'd like to thank very briefly our staff and the Office of General Counsel for their hard work on this and while it is invisible to the outside world the Office of General Counsel has made a number of changes to the means and methods by which we promulgate regulations in this area and those changes sped up in a number of ways by a number of days our ability to get this out and I wanted to thank Ron Katwan, I want to thank Peg Perl, and I wanted to thank Tony

Buckley especially for their hard work on this. While the consequences of their hard work are not always visible outside of this building they certainly are inside and I wanted thank you all for that.

I'd also like to thank all of the people and the organizations that supported them in putting forward comments. We had over 25 comments by sometimes collections of groups on this. And they were very detailed and I think enormously helpful as the commissioners think through the problems before us.

And I also want to express particular appreciation to the fifteen individuals who have agreed to give of their time to come and present before us as witnesses. We are looking forward to their insights, their experience, and their expertise in this area.

This is the format we are going follow over the next two days. There are

fifteen witnesses who have been divided into five panels. There are three panels for today and for two tomorrow.

Each panel will last between one and two hours depending upon the number of panelists. We will break for lunch and we will also have a break between today's two afternoon panels.

Each witness has five minutes for an opening statement. We have a light system at the witness table to help you keep track of your time. The green light will start to flash when there is one minute left.

The yellow light will go on in 30 seconds and a red light means that it is time to wrap up your remarks.

The balance of the time is reserved for questions by the Commission.

After opening statements I will open discussion by asking for whether there are questions from the commissioner. The commissioners can seek recognition from me

and we have no particular order for proceeding.

We have done this in the past in a number of proceedings and it has worked fairly well in generating a conversation between the witnesses and the commissioners and hopefully it will proceed well again today.

The general counsel and staff directors are also free to ask questions of the witnesses.

We're going to begin with opening statements from commissioners and my understanding is that there is at least one commissioner who would like to make an opening statement.

Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. I left copies of it out there and people can read it, so I will try and do this quickly.

I just wanted to highlight three

questions that I have been grappling with as I have been going through the comments in the hopes that I can get a little bit of help on these from the witnesses.

The first concerns disclosure. Obviously that's the big difference between Alternative 1 and Alternative 2, is whether we are going to continue to have disclosure.

I have always been a big advocate of transparency and disclosures. So I will state at the outset that I am leaning towards Alternative 1, but I do think that some of the commenters have raised some interesting problems with Alternative 1, notably in those instances where Congress may not have thought through what it was going to mean for them to have disclosure because they were not anticipating that these entities would be able to make electioneering communications.

And I think some non-profit organizations have raised some issues and the unions have as well, so I would like some

help from the witnesses as to whether we have the flexibility under the statute to accommodate the concerns that have been raised by some of these organizations, and if so, how can we go about doing that.

Secondly, there is this issue that intrigues me about condemnation. In the Wisconsin Right to Life decision Chief Justice Roberts distinguished the Wisconsin Right to Life ads from the hypothetical "Jane Doe" ads that were described in the McConnell litigation, and Justice Roberts wrote:

"That ad, the one in the hypothetical McConnell litigation, condemned Jane Doe's record on a particular issue. The Wisconsin Right to Life's ads do not do so. They instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed one would not even know from the ads whether Senator Feingold supported or opposed filibusters."

So what do we do with this? Does this mean that in order to be permissible an ad can't state the position of the candidate or officeholder that is mentioned in the ad? Can they mention it as long as they don't condemn the position? And if so, how would we define condemning in a way that would give clear guidance for the regulated community about what they can and can't say?

And I'll note in this context that one of our later witnesses noted on his blog that whatever we do, we are probably going to be both condemned and criticized. All I can say about that is to paraphrase former Speaker Tom Reid who said something along the lines of, "I don't expect to avoid criticism, I just try not to deserve it."

The third issue that I wanted to raise was this issue of reasonableness.

If you look at the wording of the three different standards for express advocacy or the "functional equivalent"

thereof, I notice at least a striking similarity in the wording, although a number of our commenters seem to think there is a big difference.

So we've got 100.22(a) which in part defines express advocacy as communications of individual words which in context can have no other reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates, and that's in the "magic words" section.

100.22(b) defines express advocacy as a communication that when taken as a whole and with limited reference to external events such as the proximity to the election could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.

And then the Supreme Court said that an ad is a functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation

other than as an appeal to vote for or against a specific candidate.

It sounds an awful lot alike, and yet people make a whole lot of the differences. So any guidance that the witnesses would care to share as to why they think these three standards have such huge differences in interpretation would also be appreciated.

And that is really all I wanted to do and I am looking forward to hearing what people have to say.

CHAIRMAN LENHARD: Very good. Do any of the other commissioners wish to make an opening statement?

No one seeking recognition, our first panel this morning consists of James Bopp on behalf of the James Madison Center for Free Speech and also plaintiff's counsel in the decision of Wisconsin Right to Life versus FEC. Mr. Bopp, congratulations on your victory there.

Transcript of First Panel not Included

action" is to have people calling about legislation.

CHAIRMAN LENHARD: Are there any other questions or comments? Then we will recess until 1:30 when the next panel will begin. Thank you.

(Recess)

CHAIRMAN LENHARD: .I would like to reconvene the meeting of the Federal Election Commission for October 17, 2007.

We are considering revisions to our regulations related to electioneering communications in light of the Supreme Court's decision in Wisconsin Right to Life.

Our second panel consists of Jan Baran who is here on behalf of the Chamber of Commerce, Larry Gold, who is here on behalf of the AFL-CIO, and Don Simon who is here on behalf of Democracy 21.

The procedure will be as it was this morning, which is each witness will have five minutes to make an opening statement.

There is a green light provided at the witness table which will alight soon and then it will start to flash when you have one minute remaining. Thereafter a yellow light will go on when you have 30 seconds left and the red light means that your time has expired.

The balance of the time will be used for questions from the commissioners and in addition general counsel and the staff director and its representatives will have an opportunity to ask questions as well.

We do not have a particular organizational format for the questions. Commissioners will simply seek recognition and I will recognize the commissioners as this has generally provided a more free flowing form of discussion which has been more constructive as we pursue solutions to the problems that sit before us.

In general.we go alphabetically which would mean that Mr. Baran will go

first, followed by Mr. Gold, and then finally by Mr. Simon. So unless you have arranged otherwise amongst yourselves, we will proceed accordingly. So, Mr. Baran, you may begin at your convenience.

MR. BARAN: Thank you, Mr. Chairman and members of the Commission.

The Chamber of Commerce would like to address three specific areas of concern at this hearing.

First, I would like to point out that the proposed grassroots lobbying exemption does not protect all the speech that is permitted under Wisconsin Right to Life.

The second proposed exemption should be included in the definition of electioneering communications and thereby exclude exempt communications from reporting.

Third, as our comments noted, we believe this is the appropriate opportunity for the Commission to formally repeal Section

B of its regulations of finding of express advocacy.

Regarding the proposed exemption, the Wisconsin Right to Life case clearly sets forth guidelines for the Commission to follow in fashioning this so-called safe harbor which otherwise is known as the First Amendment, and the Commission has to be diligent in insuring that all electioneering communications are susceptible of any reasonable interpretation other than as an appeal to a vote for or against a specific candidate and fall within that safe harbor.

These communications are not the functional equivalent of express advocacy and therefore are outside the scope of the McConnell holding.

Unfortunately, in our opinion the Commission's proposal fails to encompass all communications that are not express advocacy or its functional equivalent.

The proposed rules impermissibly

limit the scope of grassroots lobbying to speech that discusses pending issues only, to speech that addresses current officeholders only, to speech that does not mention voting by the general public, and to speech that makes no mention of an officeholder's position on an area of public policy.

The Wisconsin Right to Life case does not limit grassroots lobbying so drastically. Issues in question need not be pending, the subject of an ad need not be limited to an officeholder, and voting by the general public may be mentioned and discussion of public policy positions is permissible so long as the call to vote for or against based on that position or on any other imputations that are per se inconsistent with the public office are not made.

The Commission in crafting its safe harbor should carefully hew to the language of the case and straying too far

inappropriately adds a degree of uncertainty and a limitation of scope that will cause permissible speech to fall outside the very safe harbor that is meant to protect it.

Secondly, we urge the safe harbor would thereby exclude reporting. The Supreme Court has never mandated disclosure for communications that are not either express advocacy or its functional equivalent.

Because the grassroots lobbying that must be protected in this rulemaking is not express advocacy or its functional equivalent, no compelling government interest exists that justifies its regulation and to impose such a disclosure requirement or any other regulation on an entity conducting grassroots lobbying simply is contrary to the judicial command.

Therefore the Commission should remove permissible lobbying from such speech-chilling regulation.

Finally, the Wisconsin Right to

Life case in its tailoring of the definition of electioneering communications also impacts the regulatory definition of express advocacy.

Express advocacy is defined as words that expressly advocate the election or defeat of a clearly identified candidate.

The definition of electioneering communication must be limited to cover only communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

In demanding that any standard be clear, the Supreme Court cautions against a review of factors outside the four corners of a communication including the ad's timing, its effect on listeners, and the context surrounding the ad.

Subsection (b) of the express advocacy definition by contrast is unconstitutionally vague, the determination

that every court that has addressed this, what I would call discredited Furgatch-based standard, has made.

It requires consideration of all of those factors that the court in Wisconsin Right to Life rejected, specifically including references to external events, such as the proximity to the election and usage of an effects-based and context-based reasonable person test.

The Commission should take the opportunity to finally remove this unconstitutional section from the definition of express advocacy.

In making the changes that I have touched on today and is more fully explained in the Chamber's comments to this proposed rulemaking, the Commission will enact rules and the parties are free to make grassroots lobbying communications free from the chilling effect of unconstitutional regulation while having set forth clearly

defined guidelines as to what is and what is not express advocacy or electioneering communications.

Thank you.

CHAIRMAN LENHARD: Thank you very much. Mr. Gold.

MR. GOLD: Thank you, Mr. Chairman. In my opening statement I would like to address two of the points that the four labor organizations made in our comments.

Of course, I welcome questions on any other aspect of our submission.

First, why it would be better to revise the electioneering communications definition rather than revise only the prohibition on union and corporate pay electioneering communications.

And second, if however the Commission pursues a version of what we have labeled Alternative 1, what incoming receipts ought to be required to be reported.

With respect to the basic approach

that we think the rulemaking should take, what WRTL II did was to adopt a narrowing construction of the definition of electioneering communications, much like Buckley and MCFL did for other provisions in the act.

The Congressional intent here was very clear. Congress equated the prohibition with the requirement for disclosure.

The same line applied to both. If you were prohibited from doing it you didn't have to disclose it. What they were prohibited to do, there was no contemplation. But unions and corporations would never be in a position to have to report electioneering communications because they were simply banned from doing so.

That was the assumption. It is very clear from the legislative history that electoral speech, electioneering speech, if you will, was the target of this.

After all, the Congressional Record

is replete with many, many statements about sham issue ads, negative advertising, losing control of our campaigns and the like. That is what drove this legislation.

In the comments I note that in the comments of two national political committees today that same spirit remains.

They say that the disclosure requirements continue to perform an important function in informing the public about various candidates' supporters and that the party committees have a real direct interest in having access to information of this character which is essential to their own strategic decision making.

But that is not really what WRTL decided.

WRTL took a very different view of much of the communications and that is why it arrived at its narrowing construction.

You obviously are acting in an unexpected situation. Congress did not

foresee a class of electioneering communications that unions and corporations couldn't undertake and what the consequence of that would be.

However, one aspect of the statute that has been unremarked in this, including by us, is the so-called backup definition of electioneering communications.

Congress did foresee the possibility that the Supreme Court would strike down some aspect of the law and it provided a backup definition, and again, it was a definition.

This is Section 434(f)(3)(a)(2), and it says, "if clause one, the primary definition of electioneering communications, were held to be constitutionally insufficient by final judicial decision to support the regulation provided herein."

That's the language. And then it provides the backup.

Now the Supreme Court in WRTL II

did not facially invalidate it, of course, or at least on the surface preserved McConnell. But the spirit is clear, I think, that Congress intended that if there was any invalidation of the statute that the definition would change accordingly.

It is important to underscore that the act nowhere regulates the non-electoral activity of non-registrants in requiring disclosure of so-called electioneering communications broader than how the WPTL II narrative would be an unusual departure.

And we believe that the approach taken by the statute for the regulations for reporting of independent expenditures provides an appropriate model.

There, again, the line of prohibition also defines the line of disclosure.

However if you do take a different course it is a very important matter, as Commissioner Weintraub noticed and is noted

in one of her questions, "What is to be disclosed?"

Again, this is a situation not contemplated by Congress.

The statute itself, at 434(f)(2)(e) and (f) talks in terms of contributors who contribute $1,000 or more since January 1st of the previous year.

The Commission in its reporting regulations appropriately corrected that terminology to donors who donated funds because we are not talking about contributions within the meaning of the act, but either way, whether you're talking about contributed or donated, those words only mean some type of voluntary transfer, without any consideration, and without an exchange, without purchasing value.

That means that such income and receipts, dues, investment income, damages awards and other commercial income and the like ought not to be subject to disclosure.

In reading the comments I see no commenter who has argued otherwise. Even Democracy 21 and its allies, when talking about corporations, acknowledge that if there's business income that is paying for this, the corporation itself ought to be designated as the contributor of those funds, as the source of those funds.

So, we would urge that you adopt that course, just on the basis of what the statute and the regulations already say.

In addition, I think very strong policy reasons against taking a broader approach to this -- there would be a tremendous burden on unions in particular. The obligation to report income at the $1,000 level would be remarkable in comparison to a regulatory requirement by the Labor Department under a long-standing law, the Labor Management Report and Disclosure Act, which requires unions to disclose all receipts at the $5,000 threshold.

This would supersede that merely if any labor organization engaged in any electioneering communication.

Let me close with an example.

I am aware of a situation where a union in a large city in the United States has a weekly radio broadcast. It just pays for that time and on that broadcast it can do whatever it wants and say whatever it wants.

It is on an AM station and it costs the grand total of $150 a week, which is rather astonishing because it's in a large municipality.

But nonetheless the point is you can see an argument where, if within the electioneering communications timetable there is reference to a clearly identified federal candidate, no matter what the context, that union under a broad disclosure rule could be required to disclose the sources of any thousand dollars or more of receipts from January 1st of the previous year and that

could not possibly be good public policy.

Thank you.

CHAIRMAN LENHARD: Mr. Simon.

MR. SIMON: Thank you, Mr. Chairman. I appreciate the opportunity to testify this afternoon. I want to focus my comments on two points.

The first relates to the question of whether the Commission should maintain the disclosure requirement for electioneering communications.

As we indicated in our written comments we believe that you should.

At the oral argument in the WRTL I case, Chief Justice Roberts memorably asked the Solicitor General whether the government was not playing "bait and switch" by first holding out on McConnell the possibility of "as applied challenges" to Section 203 and then arguing in WRTL that McConnell foreclosed "as applied challenges."

The same kind of "bait and switch"

is being played here. The plaintiff in WRTL did not challenge the Section 201 disclosure requirements and repeatedly reassured the Supreme Court that if it did permit corporations to make some electioneering communications there would continue to be full disclosure of the spending and the whole system would be transparent.

But now having won the Section 203 argument on that basis many urge the Commission to reach out and eviscerate the disclosure requirement.

The argument made is that the court gave WRTL more than it asked for, but at least insofar as disclosure is concerned, it clearly did not.

The court said nothing about disclosure and the analysis used to evaluate the "as applied" constitutionality of Section 203 cannot logically be extended to invalidate the disclosure required by Section 201.

The standard of review is different. Strict scrutiny versus intermediate scrutiny. The nature of the burden is different -- a ban on spending versus a disclosure of spending that, as the court previously said, "does not prevent anyone from speaking." And the nature of the governmental interest is different -- an Austin-type interest versus a public informational interest.

Yet, notwithstanding these differences on every level of the analysis and notwithstanding the court's own silence on the matter in WRTL, and notwithstanding the court's eight to one majority ruling in McConnell that the disclosure provision is facially constitutional, you are being asked to make a determination that Section 201 is unconstitutional.

Surely the fact that Justices Scalia and Kennedy, as well as Chief Justice Rehnquist in McConnell, agreed that Section

201 was constitutional while at the same time voting to strike down Section 203, indicates that they think the analysis of the two provisions is completely different and there is nothing in WRTL that indicates that they or any other member of the court has changed their mind on this question.

My second point is perhaps an obvious one but you should keep it foremost in mind.

The controlling opinion in the WRTL case is the one written by Chief Justice Roberts. Not the one written by Justice Scalia. Many of the comments before you are written as if Justice Scalia's opinion sets the law of the case.

Although these comments acknowledge the susceptible of no reasonable interpretation test, they then urge you to impose the kind of Bright Line magic words clarity on it that Justice Scalia says the First Amendment requires.

For similar reasons these comments urge you to repeal sub Part (b) of the express advocacy definition, a position that would almost certainly be required by Justice Scalia's opinion.

The Chief Justice, and Justice Alito for that matter, could have joined Justice Scalia's more extreme opinion and certainly they were tweaked for not doing so.

So we have to assume it was a very deliberate choice on their part, and you have to give effect to the important differences between Justice Scalia's opinion, which does insist on Bright Line magic words standard, and the controlling opinion which does not.

As unsatisfactory as many believe the test set forth in the controlling opinion may be, you have no choice but to implement it.

That opinion says the test is objective and that opinion also says that the test meets the imperative for clarity in this

area.

Ultimately, there is no escaping the fact that it leaves the Commission in the first instance, and beyond that a court, in the position of exercising a judgment about whether the text of a given ad is susceptible of a reasonable interpretation as something other than electoral advocacy. Because that standard is constitutional, necessarily so since it is the controlling standard of the Supreme Court, then so too is the virtually identical sub Part (b) standard that the Commission adopted twelve years ago and more recently started applying.

We support the safe harbor proposed in the NPRM, but, since we think more guidance is better than less, we also urge you to make clear in the rule and in the commentary that ads which contain what the controlling opinion called indicia of express advocacy, such as the mention of an election or candidacy or comment on the candidate's

character or fitness for office, those will be factors that will weigh against an ad's eligibility for the exemption.

We are not suggesting that these indicia be per se disqualifying in the same way that the safe harbor is per se protective, but we think that the Commission should state that it will view indicia of express advocacy as precisely that -- indications that the ad contains express advocacy or its functional equivalent. Thank you.

CHAIRMAN LENHARD: Thank you very much. Questions from the commission? Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. I am delighted that we have Larry and Don on the same panel because I want to ask Don about something Larry was talking about. And that is, suppose we wanted to adopt Alternative 1, but we had some concerns about the kind of issues that Larry raised.

Could we do it in such a way that we exempted from disclose membership dues, business income? Do we have permission to do that under the statute? And would your organization cry foul if we did?

MR. SIMON: In terms of business income, you can exempt that and I think there's actually a precedent in your regulations in this area.

I would point you to 114.14(c)(3) which sort of on the flip side in terms of when money received from a corporation can be used for electioneering communication, that exempts money received from a corporation in exchange for goods or services provided at fair market value.

That's the concept of business income that you already have applied in this context and could reasonably apply sort of in the reverse situation.

Membership dues I find harder to deal with, frankly, and I will be honest

about this, or straightforward about it.

I don't know that, based on just a reading of the disclosure provisions of the statute, you have the authority to exempt union membership dues. It's a problem Congress could address and fix.

It is frequently the case after a Supreme Court opinion that Congress has to go back and amend the statute and that may be the situation here.

The problem I have with membership dues is that there are membership dues for union, but then there are membership dues for other types of organizations like nonprofit orgenizations. Take the Chamber of Commerce.

If you exempt one, does that drive you to a kind of a slippery slope analysis of exempting them down the line? And if you do that you may then have eviscerated the donor disclosure requirements of the statute.

And that you should avoid, because I think Congress crafted those donor

disclosure provisions for important reasons that the court in McConnell specifically pointed to and quoted at length the district court's discussion of them, where it talked about the importance of these provisions in order to avoid sort of "false front" organizations.

And if you don't have the donor disclosure you get Republicans for Clean Air or Citizens for Value and the court discussed those examples. That's the importance of the donor disclosure.

And let me say one more thing.

Congress in crafting these provisions put in two levels of protection. One is the $1,000 threshold, which is a much higher threshold than we have in other parts of the law, for instance in independent expenditure reporting, so that's one protection that membership dues that don't reach the $1,000 are not subject to disclosure.

The other protection to put in, which shouldn't be undervalued, is the ability of an organization to set up a segregated fund and engage in the disclosure only insofar as donations to the segregated fund are concerned.

What Congress was doing here was trying to balance the importance of disclosure on the one hand versus the intrusiveness or burden of disclosure. And these are the balances that Congress struck and the protections they tried to build in.

If at the end of the day Congress in this new context, after the Supreme Court's opinion judges that those protections that were initially built are not sufficient, then it might have to recraft the disclosure provisions, but your ability to do so is limited. I think you have to take the statutory language at face value.

MS. WEINTRAUB: Are there any policy reasons why we would want a union that

ran an electioneering communication to have to disclose the names of all of its dues-paying members? Are we going to get any useful information?

MR. SIMON: I don't think so. I don't think so. From my point of view, the virtue and the policy importance of the donor disclosure is in the context that the court talked about, in terms of having the spender disclosure meaningful by the public knowing who is behind it and getting around the problem of this kind of "false front" type of organization.

MS. WEINTRAUB: Well, then I turn back to you, Larry. Is there some way we can exempt membership dues and still catch the Wyly brothers?

MR. GOLD: The statute, as I said, the main point is that the statute talks in terms of "contributing contributions" and you have interpreted it to mean "donating donations."

Union dues are neither. Plainly they are neither.

There is no public policy value whatsoever in requiring any organization to reveal its members just because they engage in a single electioneering communication and I don't hear any policy reason either from Mr. Simon.

The fact is that any organization that truly has dues, including -- I don't know what the Chamber's dues are, but I am sure they are a lot more than union dues ordinarily are, and that's because there are corporate members -- but whatever they are, there are dues levels.

It seems to me that if somebody gives funds at the dues level -- pays dues -- that is not a donation, that is not money contributed. If that individual voluntarily gives more, that is truly a donative act and then you are beginning to count perhaps towards the $1,000.

But you do clearly have the authority to make those distinctions and you ought to do so. And the availability of the option that you're suggesting in one of the alternatives -- a separate fund, even a union or corporation having a segregated fund, and just dealing with that -- that doesn't really address this issue completely.

MR. BARAN: If I could opine here. This discussion underscores that Congress, and perhaps in BCRA, never contemplated this disclosure issue, because unions and corporations are going to be banned from making electioneering communications.

Since that time Congress has had no further comment on this issue, not that it is an issue that is not getting attention of Congress.

Grassroots lobbying is not a new issue. It's something that is strongly and is extensively debated in Congress, but not in the campaign finance context.

It is debated in the context of other legislation which more appropriately addresses this issue, which is lobbying disclosure.

I would like to point out that Congress had an opportunity after the Wisconsin Right to Life case to opine on disclosure involving grassroots lobbying which is what Supreme Court has said this has now become. It is grassroots lobbying. It not campaign finance. It is not meeting any compelling governmental interest. It's not prohibited. It is actually protected by the First Amendment.

What has Congress done since the Wisconsin Right to Life case? Well, it passed a major lobbying disclosure law, the Honest Leadership and Open Government Act. And they rejected any disclosure of any sort regarding grassroots lobbying, because it was so controversial and it was so intrusive into the internal affairs of membership

associations.

MR. SIMON: One comment on the first part of what Jan said. I don't think it is actually true that Congress never contemplated disclosure in the context of corporations, because if you look at the original statute, the original statute contemplated that at least C4 corporations would have the ability to make electioneering communications under certain circumstances subject to this disclosure regime.

That provision was functionally repealed by the Wellstone amendment. This is in 441 BBEC.

If you sort of freeze-frame the statute prior to the Wellstone amendment, there is a requirement for disclosure by a C4 either of all of its donations over $1,000 or donations put into a segregated fund, and although that became a sort of meaningless section, given the Wellstone amendment, it does provide an indication at least of an

original congressional intent on this.

MR. BARAN: By a sponsor. Not by Congress. It was never adopted.

MR. GOLD: Isn't that precisely the point? That you can find a whole lot of stuff in the legislative history. Somebody proposes something, the law had some form, and then it was an amended, but the only thing that really reveals Congress's intent is what they ended up doing.

That history that Mr. Simon describes proves exactly the opposite point.

CHAIRMAN LENHARD: Well, I think he was rebutting the notion that Congress never considered it.

MR. SIMON: But that provision is in the statute. It is in this book. And then, as a practical matter, overridden.

MR. BARAN: But there was never a debate in Congress about how unions or associations ought to disclose these contributions, or at least I don't recall

that, but I would like to be corrected if there was a debate about that, but I don't recall it.

CHAIRMAN LENHARD: Yes, certainly one of the problems that we are wrestling with here is that in the Wisconsin Right to Life decision the court makes clear that there are lobbying type communications and other issues of types of communications which are protected by the First Amendment and cannot be prohibited in the way they have been and that this draws in a broader group of entities to the regulatory regime than was initially contemplated, and we have to wrestle through that problem in some way.

Vice Chairman Mason.

VICE CHAIRMAN MASON: I want to ask about the relationship of the three definitions that we are concerned about here -- really, just the two.

And I previewed for Mr. Simon, but Mr. Baran, and Mr. Gold, the Wisconsin Right

to Life standard in 100.22(b), which is broader? Which is narrower?

MR. BARAN: Which standard?

VICE CHAIRMAN MASON: Comparing 100.22(b) with the Wisconsin Right to Life standard, which is broader and which is narrower?

MR. BARAN: The issue is which one is more vague and possibly unconstitutional.

I think that we are trying to compare these two concepts in a potentially inappropriate way, for the following reasons.

First of all, sub Part (b) is supposed to be the definition of a term called express advocacy. It is not a definition of the functional equivalent of express advocacy. It is express advocacy which, by the way, was defined in the Buckley case and after the Buckley decision Congress decided, that's a pretty good definition of what we are regulating and prohibiting and we are going to put it into the Federal Election Campaign Act, and that is in the statute.

What you have done in your sub Part (b) regulation is two things.

Number one, you have interpreted that statute in a way beyond the way it was defined in Buckley and in the statute in my opinion. But, more importantly, you have done that in a way that creates constitutional uncertainty, and therefore it is constitutionally void in my opinion.

Over in the electioneering communications portion we have the reverse in the Wisconsin Right to Life committee because the analysis begins with a statute upheld in McConnell.

That is clear. It regulates certain advertising at a certain time that refers to a candidate or a political party and now what the Supreme Court has done is it says, that clear definition is too broad, and now we have to carve out from communications that fall within that definition in regulations so that people can engage in what

the court has determined is their First Amendment rights and you're having some difficulty in creating clarity in the carve out, although the court has told you, if in doubt, you should fall in favor of more speech. Not more regulation.

The idea that's embedded in sub Part (b) is in essence part of the electioneering communication issue which Congress has addressed by passing the electioneering communication statute.

So I don't think that sub Part (b) really defines the term as it was adopted in Buckley or incorporated in the statute.

VICE CHAIRMAN MASON: You think it's void? All right, you have a client walk in your office and they have an ad and they want to run in the 30 or 60 days relevant period and you look at it and you say, "Well, under Wisconsin Right to Life you can run this."

Now, as a counsel advising your client, what do you tell them about

100.22(b)?

MR. BARAN: I actually start with 100.22, and I say, I'm going to look at this ad and I want to see if it has any explicit words that expressly advocate --

VICE CHAIRMAN MASON: Now, when you are doing that, what is the result? Does 100.22(b) kick out more ads or does the Wisconsin Right to Life kick out more?

MR. BARAN: Kick it out? Do you mean you --

VICE CHAIRMAN MASON: Prohibit.

CHAIRMAN LENHARD: Protected speech? Leads to enforcement actions -- you can choose another framing.

MR. BARAN: Well, my trouble is I don't know what 100.22(b) means.

VICE CHAIRMAN MASON: But you said you tried to advise your clients.

MR. BARAN: I am advising my clients as to whether there are magic words. That is express advocacy as defined in

Buckley and in the statute.

Of course we didn't worry about sub Part (b) because it had been declared unconstitutional three times and you have just recently decided to resuscitate it and try your luck again in court and I am here hoping that you will just repeal it so we will not have to go through all that litigation again.

VICE CHAIRMAN MASON: I understand. Mr. Gold, please.

MR. GOLD: You're asking a question. I think the answer is, what's the difference? Which is broader? Which is narrower?

I don't know from the language actually which is broader and which is narrower. If you look at -- Commissioner Weintraub has helpfully, in her last question, laid out the three different formulations, and I think the reason I don't know is that 100.22 which was adopted by your

predecessors well before BCRA and well before Wisconsin Right to Life II and well before the Roberts-Alito formulation of what is the functional equivalent of express advocacy, setting this particular language aside, the functional equivalent of express advocacy has to be different than express advocacy. Otherwise it wouldn't have a different designation. It has to be different.

Express advocacy, of course, is a prohibition for unions and corporations that applies all times in all media.

Electioneering communications, the functional equivalent, is a narrower prohibition that only applies in the broadcast media at certain times and locations.

What the Commission really needs to do is to take a fresh look at 100.22 in light of the fact that Congress enacted BCRA and enacted the electioneering communications definition that the court has now defined

with language that calls into question 100.22.

That's just the simple reality of it. I don't think it is a matter of accepting and parsing the differences, because the language is extremely similar. It is what is plausible here and what is reasonable there.

In a way you are dealing with apples and oranges and you have to go back to the first principle I said, which is, they are different because the court has said they are different.

The functional equivalent has to be different. It must be a little bit broader. I assume it must be a little bit broader. Otherwise it is completely redundant, because if a union or a corporation cannot do an electioneering communication on the basis of express advocacy, then functional equivalent must be something different, but it is not much different. I mean, I cannot imagine it

is very different at all. And that is something that you need to wrestle with, not necessarily in this rulemaking as we suggested, given the timing and the imminence of primaries and caucuses and the like, and just the realities of the situation.

VICE CHAIRMAN MASON: Mr. Simon, you say they are the same. What do you mean by that? Do you mean they are actually the same? Because we run across times when courts, for instance, use different language, but really it is the same test and sometimes we will get an opinion that finally resolves that and says, well, it is same.

Is that what you mean? Or do you mean, as Mr. Gold says, they are kind of the same or almost the same? Because it makes a difference in how we think about applying this.

MR. SIMON: I don't know if that is a question on the epistemology or law.

VICE CHAIRMAN MASON: Then let me ask it this

way. Is there real live example of an advertisement? Or can you think of a hypothetical where one would apply and the other would not?

MR. SIMON: I cannot. I think they would have the same outcome, whether you phrase it as susceptible of no reasonable interpretation other than, or you phrase it as, could only be construed by a reasonable person as.

To me it is the same test and it will yield the same results.

What that means as a practical matter is that anything which will be a prohibited electioneering communication or an electioneering communication for which corporate and labor union treasury funds cannot be used is also a prohibited corporate or union expenditure.

I don't look at these tests and say they are going to have different outcomes when you get one result under 100.22(b) and a

different result under the electioneering communication provisions.

VICE CHAIRMAN MASON: The problem with that is that the electioneering communication prohibition and the expenditure prohibition would be identical.

MR. SIMON: Yes, they would, except ironically there are a couple of jurisdictions that Jan pointed out where as a matter of court ruling currently you cannot apply under 100.22(b), but you certainly can apply the electioneering communications provision. So at least in those jurisdictions they have independent significance.

Let me just say one other thing which is that for the twelve years that 100.22(b) has been in the regulations it has been subject to lot of controversy and it has been subject to questions about its constitutionality, principally on grounds of vagueness.

I think the WRTL opinion actually strengthens the Commission's position in having sub Part (b) because if the test set forth in the controlling opinion meets, in the words of Chief Justice Roberts, the imperative for clarity in this area, if it meets that imperative for purposes of the definition of electioneering communications, then it also meets that test for purposes of the sub Part (b) standard.

CHAIRMAN LENNARD: But isn't the Chief Justice's position that the situation is strengthened by the fact of interpreting a statute that has a very narrow and concrete time frame in which it applies, and 100.22 applies in all settings?

MR. SIMON: I don't think so, because he's talking about whether this is a standard, this reasonable person, reasonable interpretation standard, applied acontexturally just to the text of an ad in what he calls an objective fashion, because

you are not examining intent, you are not examining effect, you are examining essentially the text of the ad, that standard is sufficiently clear for constitutional purposes.

And whether it derives from the electioneering communications statute or whether it derives as an interpretation of the express advocacy standard, the question of whether it is vague or clear I think is the same in both contexts.

MR. BARAN: No, because in one context you are using a standard, assuming they are the same, which I disagree with, you are using a standard to exempt certain speech from regulation.

Whereas, in the other context you are using it to try to regulate.

Sub Part (b) is regulating speech. It is saying that it is certain speech under that standard, which I believe is subjective, vague, and inconsistent with the standards

that are enunciated in the Wisconsin Right to Life case, that standard is going to regulate speech.

The exemption under Wisconsin Right to Life is permissive. You are going to say, notwithstanding a very clear statute that says you unions and corporations may not pay for broadcast communications, during certain times in certain areas you can still engage in --

MR. SIMON: But that's just two sides of the same coin. Whether you frame it as you can regulate from here to here, or whether you frame it as you have to exempt from here to here, the line is drawn in the same way by this reasonable interpretation test.

MR. GOLD: Two points. The electioneering communications provision in WRTL II standard is susceptible to reasonable interpretation is not acontextural.

It is in the sense that Chief

Justice Roberts explained as far as how you determine something, but the context is precisely with 30 and 60 days of an election and is something that can be received by 50,000 or more people in the relevant electorate. That is the context. So that does bear on, as the chairman suggested it might, that does bear on how you interpret it.

Let's not forget that functional equivalent of express advocacy was a McConnell term, not a WRTL term. I think it forces 100.22 in the Commission's definition of express advocacy back into a subsection of 100.22(a). I think it crowds out 100.22(b) as a practical matter.

And, as Jan Baran said, every court that has looked at (b) has struck it down. I do not think express advocacy can be defined any longer to read as if it were the functional equivalent of express advocacy. That is the main point.

You do have two different standards and they are very close together. I cannot give you chapter and verse as to how close, but very, very close together, but (b) I think is gone because of WRTL II defining a different concept.

CHAIRMAN LENHARD: What do we do then with the language in McConnell where the court in describing the interpretation of express advocacy as the magic words test found it functionally meaningless as a test or a standard by which to evaluate that?

The Chief Justice was very clear. He was finding his decision in line with McConnell. He was not reversing McConnell. So what do we do with that language? How do we interpret that in looking at our regulations?

MR. BARAN: The answer is simple. Which is once something like the express advocacy "magic words" test becomes ineffective as a statute, what McConnell says

is that Congress can pass another type of statute which it did. It passed the Electioneering Communications.

CHAIRMAN LENHARD: But it wasn't the statute that had become ineffective. It was the Supreme Court's interpretation of the statutory language that had lots its --

MR. BARAN: Again I would point out that it was Congress that adopted the language from Buckley and put it in the statute, and said, okay, we are going to regulate this. We are going to regulate the magic words statute.

What the McConnell decision says, and therefore refutes several prior court of appeals decisions, is when the Buckley court came up with the "magic words" test in interpreting the original statute they did not intend to say that that is the only way constitutionally that Congress can regulate political speech.

And it is because of that ruling in

McConnell that they can then turn to electioneering communications, and say, Congress has now come up with something in addition in electioneering communications. So let's analyze that under First Amendment principles.

This analysis is reflected in several of the court of appeals decisions since McConnell. There was a decision in the Sixth Circuit, one in the Fifth Circuit, and there was just a consent order that we engaged in with the Attorney General of Pennsylvania.

Each of those jurisdictions had an express advocacy standard for independent expenditures but their legislators had not adopted any other regulation like the electioneering communications regulation.

What those courts basically say is, what we have learned from McConnell is, that if you, the state, want to regulate additional speech beyond express advocacy,

well then go pass a law, an electioneering communications law, but it has to be constitutional and now we are discussing Wisconsin Right to Life II, starting with the circumscribed limits of regulating electioneering communications, but that is what you have to do in Congress or a state legislature.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: But in crafting it you can cannot go beyond a standard that is the functional equivalent of a standard that we've already declared to be functionally meaningless.

MR. BARAN: The functional equivalent language justifies Congress's purpose in creating electioneering communication. They have decided that they want to regulate, not just express advocacy, they want to regulate the functional equivalent of express advocacy.

What was their proposal that they created? Well, let's ban corporations and unions from funding certain types of advertising that refer to a candidate over a period of time.

So that's the current solution for regulating the functional equivalent of express advocacy.

Now you are faced with this new Supreme Court decision that says that while that type of regulation withstands facial constitutional attack as applied to certain speech it is unconstitutional.

So, you, the commissioners, have this burden of coming up with a clear safe harbor to carve out that will protect everybody's First Amendment rights to engage in that type of speech. I do not envy your job. That's where you are, and that's where all the analysis comes to.

MS. WEINTRAUB: Let me just follow up one more time because I was struck by your

written comments. I'm basically going to ask you the same question I asked the earlier panel.

I know that a lot of people have a long-standing antipathy to 100.22(b), and are just champing at the bit for an excuse to throw it out, and I get that.

But when I look at the language, first of all, 100.22(a), which is the one that nobody ever complains about, it includes within its definition of express advocacy communications of individual words which in context -- that nasty word, "context" -- can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates.

I will note that in the Wisconsin Right to Life opinion Chief Justice Roberts, right after he said, you know, we should avoid contextual factors, or rather that they should seldom play a significant role in the inquiry, the opinion goes on to say

immediately, "Courts need not ignore basic background information that may be necessary to put an ad in context such as whether an ad describes a legislative issue that is either neither subject of legislative scrutiny or likely the subject of such scrutiny in the near future."

So there is some amount of context that the Chief Justice is willing to let us look at.

When I look at 100.22(b) next to what Chief Justice Roberts said, I have a really hard time coming to the conclusion that an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, provides clarity and constitutional lack of vagueness, but an ad that can only be interpreted by a reasonable person as containing advocacy of the election or defeat or one or more clearly identified candidates -- suddenly this is horribly vague.

Because it doesn't look that different to me and I want to particularly ask you, because I know you commented on this, about the interjection of the "reasonable person" somehow making it wrong.

Who is supposed to come up with the reasonable interpretation or make the determination that there is no reasonable interpretation under Justice Roberts's test other that a reasonable person?

I mean, clearly an unreasonable person is not going to make that determination and I don't think we are going to get the word from on high so somebody has got to figure that out.

MR. BARAN: My approach has always been to look at the words and do the words expressly advocate the election of or defeat of a clearly identified candidate?

MS. WEINTRAUB: And you, as a reasonable person, think you can figure that out?

MR. BARAN: Interjecting "the reasonable person" interjects something the Wisconsin Right to Life case rejected, which is effects-based subjectivity.

That is saying, well a reasonable person is going to look at that ad and say, "It looks like they are trying to persuade me to vote one way or the other," right?

MS. WEINTRAUB: But somebody has to come up with a reasonable interpretation.

MR. GOLD: If I may, and as I said, I think the discussion in WRTL II, and the narrowing construction of the electioneering communications provision points to the fact that express advocacy itself really is confined to the classic "magic words" and that the extra language in (a) and (b) is not supported and Buckley was clear.

I think McConnell and WRTL both affirmed the classic definitions of express advocacy and neither of them talks about express advocacy in terms that stray from the

magic words. They simply don't.

For sure this is really difficult because you can read these decisions and nobody can come up with a completely convincing way to square everything. That's just the fact of the situation, because nobody takes responsibility, ultimately including the Supreme Court, for having it all make sense. That is unfortunately true.

Having said that, some things must mean something and one way go is to treat express advocacy as every court that has looked at 100.22 has -- magic words -- and then you take the Roberts formulation of the functional equivalent and you try to give that some definition.

It is different from express advocacy and the only way you can do it, really, without all of it kind of merging together in a very confusing way with very important consequences, again, electioneering communications apply to specific places and

times and media express advocacy at all times everywhere.

That is the best approach to take and you can hardly be faulted for doing so. It makes a lot of logical sense.

MR. BARAN: By definition let me say that the functional equivalent of express advocacy is not just express advocacy. Otherwise it would be express advocacy.

CHAIRMAN LENHARD: Commissioner von Spakovsky.

MR. von SPAKOVSKY: Thank you, Mr. Chairman. I am going to take us down from the 60,000 foot level of constitutional law and the Supreme Court down to the practical.

Both of you have occasionally appeared before us obviously representing clients who haven't followed your advice.

MR. BARAN: Or didn't ask for it in advance.

MR. von SPAKOVSKY: While grappling with constitutional issues is very

interesting, what we do every day is look at enforcement cases, and that's the vast majority of what we do. In the time I have been here I think I've cast probably a thousand votes on enforcement matters.

In your comments, Mr. Gold, you suggest, and some other commenters have suggested this too, that the language that we have come up with for this exemption, which is basically that the prohibition won't apply if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate, you suggested this impermissibly shifts the burden over to the person who is doing the communication.

I take it what you mean is that once a complaint is filed with us and we start looking at it the burden should not be on the individual or the organization to prove that there's any other susceptible interpretation or reasonable interpretation.

I think you are saying that it should be up to the Commission to prove that there is no other reasonable interpretation other than this.

The practical question I have for you is how should we change this to keep the burden on us to prove this case as opposed to someone who is engaging in a political speech basically having to prove that they were acting within the law?

MR. GOLD: The regulation clearly needs to reflect the controlling opinions formulation about what is the definition, number one.

The key language, the susceptible of no reasonable interpretation, has to be in there. Because that is the standard that you have. That is the standard.

Now, in regulations it is useful, we think, to include a safe harbor, but it is also very important to make clear that the safe harbor is just that. It is some level

of certainty.

If certain boxes are checked, then you know, guaranteed, that it is not susceptible of reasonable interpretation otherwise, but the regulation has to be clear that there may be other kinds of language that do not fall within the safe harbor that also would be protected.

And in all cases, yes, it would be the Commission, the government, that would have the burden to demonstrate otherwise. I am not sure that is a satisfactory answer, but that's the basic template that the regulations ought to proceed on and we have some specific comments about the safe harbor that has been proposed. The AFL-CIO and the NEA, which also joined these comments a year and a half ago, proposed effectively a safe harbor well before WRTL II.

We don't necessarily stand by that because the law has changed. The Supreme Court has now spoken. You waited to see what

they would do. Now they've done it. Here you are. It would have been easier to do what we asked.

MR. BARAN: We gave you a chance.

MR. GOLD: I know you did, and you wrote a very helpful and interesting suggestion at the time. But anyway, what I have just described is the template for approaching defining this.

The regulation is not going to be able to explain in every single circumstance what is in and what isn't. I don't think that is really something that we need to attempt.

MR. BARAN: It could provide non-exclusive examples where a message urges a viewer or the listener to contact the elected official to go somewhere, to learn more about the issue, to sign a petition.

There are a variety of different things. I assume they have come up in comments. Again non-exclusively. You would

be in a sense providing examples of calls to action, if you will, that if included in certain types of communications would fall within the safe harbor.

CHAIRMAN LEMHARD: Commissioner von Spakovsky.

MR. von SPAKOVSKY: Thank you. I have another question. Mr. Gold, you said in your comment that the best course now would be to harmonize the statutory exemption authority of WRTL by constructing PASO to mean the functional equivalent of express advocacy.

If I understand that correctly what you are saying is that basic constitutional logic of the WRTL decision would require us to exempt disclosure.

But that sentence seems to be saying that we could rest a disclosure exemption on the statutory PASO exemption that we were provided by Congress.

Do I understand you correctly?

MR. GOLD: I am not sure we are exactly saying that, but what we are saying, and this was one of the questions posed in the NPRM is, what about this limitation on the Commission's exemption authority with PASO?

Unless PASO defines a class of communications that are in between the functional equivalent of express advocacy and express advocacy, and it is really hard to figure out what that might be, that is not a limitation that you really have to deal with any more.

That phrase cannot be broader because the court in this decision has overridden what Congress said, if anybody considers it to be broader.

The most logical thing to do is to finally give guidance as to what PASO means by saying it means the functional equivalent of express advocacy.

Again, what we're trying to do is

to square a bunch of things that are very difficult to harmonize, as I said just a few minutes ago in a somewhat different context, but that is one way to do it. And you're tasked to do it.

It is very easy for Congress to throw things at you and it is very easy for the court to come down with great phrases as Chief Justice Roberts did. We are mindful that your task is to really deal with it at a micro level, but a service you can perform is to make as much sense as you can with what has been provided to you.

And you may be criticized by some, but you can hardly be faulted in a defensible way if you do that.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: Since we are talking about examples and the value of examples, I believe that Mr. Simon in his comments actually did weigh in on each of the

examples in the NPRM, but I don't think that you guys did.

So I am going to put you on the spot here, Mr. Gold, and Mr. Baran, and ask you if a corporation or a labor union within 60 days of an election wanted to run the Billy Yellowtail ad, can they do it under Wisconsin Right to Life?

MR. BARAN: I am looking to be reminded of what the issues were that were implicated in that ad because I don't recall any.

VICE CHAIRMAN MASON: It has to do with family values. He took a swing at his wife.

MS. WEINTRAUB: "Who is Billy Yellowtail? He preaches family values, but took a swing at his wife and Yellowtail's response? He only slapped her, but her nose wasn't broken. He talks law and order, but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support

payments, then voted against child support enforcement. Call Billy Yellowtail. Tell him to support family values."

MR. GOLD: If I may, that's the only full ad text that the McConnell decision addressed. Period. That's the only one that the McConnell decision addressed and the McConnell decision fairly considers that to be the functional equivalent of express advocacy. I think it does, even though it was discussed elsewhere in the opinion.

The only other partial text of an ad was a hypothetical, the so-called Jane Doe ad and that's one worth discussing, but that in itself is what that ad means, and I think there are versions of that that clearly are protected.

It isn't that if you condemn a candidate's record that's the functional equivalent, but the Yellowtail ad, if you look at the Supreme Court's guidance, and again this is just one of these items on the

table that you've got to harmonize, that's the only text that the Supreme Court has ever said is the functional equivalent.

One of the striking things about the McConnell decision is, despite the voluminous record that we all put before it, including disk after disk of seven years of about a hundred or more broadcasts that the AFL-CIO had done, the court did not unfortunately dignify the record by discussing it, which does give you some flexibility, but that may be the only ad that you can say is the functional equivalent for sure.

MS. WEINTRAUB: But both of you would agree that we can regulate the Billy Yellowtail ad. Do you agree, Mr. Baran?

MR. BARAN: Yes.

MS. WEINTRAUB: Yes, well how about Tom Kuen?

"Tom Keen, Jr. No experience. He hasn't lived in New Jersey for ten years. It

takes more than a name to get things done. Never, never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Keen, Jr. may be a nice young man and you may have liked his dad a lot, but he needs more experience dealing with local issues and concerns. The last five years he has lived in Boston while attending college. Before that he lived in Washington. Oh, gosh, how bad can it be? New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Keen, Jr. New Jersey needs New Jersey leaders."

Can we regulate that?

MR. BARAN: Well, your proposal wouldn't allow it because he was not an incumbent congressman or senator at the time, was he?

CHAIRMAN LENHARD: It wouldn't fit within safe harbor. I do think we have drawn a distinction, certainly intellectually, and

maybe not clearly enough in the text, that there is a standard or test within that, a subset of that speech that is protected by that, is protected by the safe harbor.

We may not have been clear enough about that. We can fix the clarity. It may not fit the safe harbor, but that does not necessarily mean that it would not be protected speech.

MS. WEINTRAUB: So, the question for the two of you is, do you think if we were to apply the Wisconsin Right to Life standard that we could regulate that ad?

MR. GOLD: I don't think it is express advocacy, number one. Because, again, I think express advocacy really ought to be considered as the magic words formulation and the magic words are not there.

CHAIRMAN LENHARD: And that was true of Yellowtail as well.

MR. GOLD: Right. That's exactly

right and that's why we're here. It is a fair question. I am not going to give you a definitive answer. It's a very fair question but I think it is important to say that it is not express advocacy. I would want to think about it a little bit more.

MS. WEINTRAUB: What is it if it's not a campaign ad? Is there an issue in there? Is there lobbying going on?

MR. BARAN: You have accurately pointed out that neither of us or our organizations' comments address these hypotheticals. I think we each would be glad to supplement the record --

MS. WEINTRAUB: That would be helpful.

MR. BARAN: -- with comments that we could submit, and giving it the appropriate thought and analysis that is clearly deserves.

MS. WEINTRAUB: Fair enough, but could you do that for all the seven ads that

we put in the NPRM because that really would be helpful to us.

CHAIRMAN LENHARD: I sometimes paraphrase this problem by saying, "Can you have an issue ad where the only issue is should someone be elected to office?"

One would think not. But if the only issue in the ad is whether somebody should be elected or not you are advocating their election or defeat, and yet, this hypothetical obviously puts that in a somewhat more concrete way.

MR. GOLD: It comes back to the formulation that you have to deal with which is, "An ad is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than." That's the question.

CHAIRMAN LENHARD: I think what is being suggested is that the constitutional law at this point is that those ads that cannot be reasonably be construed by

individuals as anything other than a call to elect or defeat people still are not ads to influence federal elections so long as they avoid the use of the magic words.

MR. BARAN: One would wonder whether the Yellowtail ads, sponsored by a group advocating increased protection from domestic violence, be viewed in a different way.

CHAIRMAN LENHARD: Commissioner Mason.

VICE CHAIRMAN MASON: One of the many things that bothers me about the Roberts opinion, and you have put your finger on several of them, is the section in there where he says, well, we've got to avoid the hurley burly of factors, and then in the very next paragraph he lays out a four-prong, eleven-factor test.

Now, it's October. It's going to be hunting season next month. If I see a four-prong eleven-factor anything, I am going to drill it, but how do we --

MS. WEINTRAUB: I'm sorry, but you've lost me.

VICE CHAIRMAN MASON: My apologies to Mr. Simon, but I don't think the right answer can be that you have to meet all eleven factors.

And with apologies to Mr. Bopp, I don't think the answer can be that any one of them gets you off the hook. So how do we possibly balance this sort of positive and negative factors?

In other words, to what degree, Mr. Baran, because you suggested this, does the presence of a genuine issue, and let's say Yellowtail at least at one time was in the Montana legislature and what if that bill had been up for a vote, how do we weigh that against the indicia of express advocacy on the other side of the test?

And, by the way, how in the world is that clear if we have kind of multi-factor balancing test to apply?

CHAIRMAN LENHARD: Let me add to

the hypothetical, could we even consider whether the bill was up for a vote if it wasn't specifically mentioned in the ad?

MR. BARAN: Obviously, I could give this more thought, but my reaction is --

CHAIRMAN LENHARD: When we do it it's called delay.

MS. WEINTRAUB: You guys are wimps.

MR. BARAN: Actually I am following up on an earlier comment where I proposed one approach to these regulations is to tell people if they include certain things in their ads it is clearly protected. And I previously referred to some urging of action other than voting. You could combine that with the articulation of a clear issue as well, but I would like to give it a little more thought, as I said.

MR. SIMON: Let me just state for the record that my silence over the last ten or fifteen minutes is not assent to anything said by my colleagues and in particular on

the questions about the meaning the PASO test from Commissioner von Spakovsky. I have different views than were expressed, but since the question wasn't directed to me I didn't respond.

A couple of things on Commissioner Mason's question. My reading of Chief Justice Roberts's opinion is that what he's trying to separate out -- and I overstated it before when I said that his test is acontextural. It isn't entirely acontextural.

I think what he was trying to separate out is a determination that is going to depend on a lot of discovery and depositions and document production and that sort of understanding of the intent of an ad that for better worse is exactly what happened in the WRTL case and which I think he found objectionable.

He stresses that his test is essentially about the text of the ad and

that's the grounds on which he calls his test objective. He does say, well, some context is okay. Is this an issue that is up before the legislature?

In an ultimate sense context always necessary just in order to understand what words mean. And I don't think you are precluded from that kind of readily accessible obvious context, but I do think he is saying the Commission can't go start taking depositions about what people were intending when they decided to run a given ad.

I think you are more or less limited to what the ad says and making a reasonable person determination about that.

VICE CHAIRMAN MASON: I think four corners or something like that is great, and that is understandable, but how about the real ad that has a whole bunch of different things in it?

For instance, do you think the

Chief Justice meant for us to weigh -- and let's say the Yellowtail ad was the same except that there was actually a child support bill then pending in the Montana legislature, and the ad said, "Call Billy Yellowtail and tell him to support HB whatever."

MR. SIMON: Yes, you could take into account and still determine that that ad is the functional equivalent of express advocacy.

Whatever it is you did in the series of recent MURs where you looked at ads that did not have magic words in them and concluded that those ads constituted sub Part (b) express advocacy, and I presume basically what you did is look at the text of the ad in some general context and concluded in your own judgment whether those were susceptible of a reasonable interpretation only as electoral advocacy. Whatever you did in that process I think is what you have to do in

terms of implementing his decision.

You have already done this. You already do this. You know how to do this. You are just doing it now in a related context.

MR. GOLD: I think that's incorrect because what the Commission did in those enforcement cases that Mr. Simon is referring to all preceded WRTL. And I do believe, again, what the Commission at the time should have been doing, but now clearly what it should do is, insofar as applying an express advocacy standard, it is a magic words standard.

Now what about this standard though, that you have to articulate in this regulation?

The Yellowtail plus ad that Commissioner Mason just described is susceptible of a reasonable interpretation and that is the standard here. Is it susceptible of a reasonable interpretation

other than?

It doesn't mean it can be in addition to. But is there something in there other than? And a call to action at the end of that ad to vote on a particular bill I think does take it out. Some people may not like it, but I think it does.

It's not an eleven-factor test as such, that Chief Justice Roberts spelled out. This was an as applied challenge.

He was examining the ads before him and he said, well, look at these. They do have indicia of issue advocacy.

He didn't say all indicia. He just said they do have indicia and they do have no indicia of express advocacy. He did, with respect to express advocacy, discuss a complete landscape there. But he was just analyzing the ads before him.

I don't believe anybody is really suggesting that you have got to have the complete presence of some and the complete

absence of others.

But the presence of some I think is sufficient to make it susceptible of a reasonable interpretation other than an appeal to vote for or against a specific candidate.

MR. SIMON: If I could just correct what may be Commissioner Mason's misinterpretation of our position.

When we say you have to have all the indicia we were talking about in order to qualify for the safe harbor and not in order to qualify for the umbrella exemption. And I think that's an important distinction.

CHAIRMAN LENHARD: One of the other things that struck me as I went through the comments on the safe harbor was that people were encouraging us to drop out factors or add factors that could produce the unusual circumstance of ads meeting the safe harbor, but not meeting the rule and we have to make sure that that doesn't happen because it

would be awkward in the enforcement context.

Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. Following actually directly on that comment, I wanted to ask Mr. Simon about some of the factors that we have been urged to take out of our safe harbor criteria.

Things like whether the ad is exclusively about a legislative or executive branch issue, and whether it has to be a pending legislative or executive branch issue, because maybe that group wants to drum up interest in some legislation, and whether a legitimate ad could be directed towards candidates who are not officeholders in the interests of getting them to commit to a position, should they win.

MR. SIMON: The first two I don't so much care about. The third, I do think that should not be in the safe harbor.

Let me just say two things about the safe harbor. The first is, I very

strongly second what the chairman just said. I think the kind of guiding star in how you craft the safe harbor is to avoid a situation wherein an ad would qualify for the safe harbor, but not meet the umbrella test. That's a misuse of the safe harbor.

The second point is, with a safe harbor you are conferring per se absolute protection. So I think you have to be very careful and I think the safest course is to stick very closely with what the Chief Justice outlined in his opinion and he did outline a set of factors which are indications that an ad is an issue ad and another set of factors which an ad doesn't have, which are indications of express advocacy.

Then he applied all of those factors to the ads in front of him. That is a good model for the safe harbor that you should create by rule.

MR. BARAN: Do you agree when in

doubt a tie goes to the speaker, and not to the Commission?

MR. SIMON: No, but if the ad is not within --

MS. WEINTRAUB: You might want to correct that, Mr. Simon.

MR. SIMON: The important point is, and this was stressed in the NPRM, and I think it is very important, that the importance of a safe harbor should not be overstated in the sense that an ad can fall outside the safe harbor and still be exempt.

So the determination of whether an ad is or is not within the safe harbor is very different than a determination of whether the ad is exempt.

MS. WEINTRAUB: And that's how you would address the problem raised by one of our commenters, that one could never run an issue ad on election reform under the safe harbor.

MR. SIMON: Right. Exactly.

CHAIRMAN LENHARD: One of the themes that was advocated vigorously by our first panel was stability in the law and that the Commission should approach this and do as little as necessary because of the constant changes in this area of the law, the difficulty of regulated entities and coping with that and an overall sort of regulatory theory that regulators should not go boldly off analyzing the Constitution on their own but should wait for the courts to tell them what to do.

I wanted to see if anyone wanted to comment on that because it was a theme that some of the witnesses felt fairly strongly about on the first panel.

MR. SIMON: Well, I'll start and I say this from the point of view of representing a client who is often accused of destabilizing the law.

But I think you have very specific job in this rulemaking, which is to implement

the Supreme Court opinion. That should be the guide star here. In my mind that means you are addressing precisely what the court addressed in terms of the application of Section 203 to certain kinds of ads.

You should do just that which is necessary to implement what the court said.

MR. BARAN: Bringing clarity to any regulation is always helpful to both the regulating community and to the Commission. So anything you can do to be clear in how these rules are going to actually operate, that would be helpful.

Secondly, I do think that repealing sub Part (b) is not going to be destabilizing, particularly since it has already previously been declared unconstitutional. And in fact by repealing it you inject some further clarity as to how communications are going to be regulated between express advocacy and electioneering communications.

Finally, I would also comment that no matter what regulation you actually produce part of its effect is going to depend on how you enforce it. So a regulation is just the beginning. It is not the end, obviously.

CHAIRMAN LENHARD: Commissioner Walther.

MR. WALTHER: On your comments, I read with interest your argument that the reasonable person standard should be eliminated, and that there could be no reasonable interpretation other than X.

But, in getting back a little earlier, doesn't it just transfer that responsibility from some amorphous person to the person making the communication or his or her lawyer? And then what standard is improved at that point?

What is the reason for the transfer if I am correct in that?

MR. BARAN: I believe that either

of those approaches are inappropriate in the definition of express advocacy because I believe express advocacy means what sub Part (a), although there are still some problems with it, says -- basically, the magic words test.

And thereafter, the other method of regulating other types of speech that doesn't contain the magic words is subsumed in electioneering communications.

I would like to point out, not that I am advocating this, but Congress may at some future date decide, well, we are going to amend the electioneering communications statute. We are going to make it apply for 90 days instead of 60 days. Or we'll extend it to newspaper advertising in addition to broadcasting.

I don't see the regulatory legislative process as being limited by what exists currently. I do think that there is confusion created in the regulation by

attempting to bootstrap the concept of express advocacy into something that it's not.

So I would focus on electioneering communications and if Congress wants to regulate in another fashion, then they have the opportunity to legislate.

CHAIRMAN LENHARD: Are there any other thoughts, comments, suggestions? Gentlemen, any closing thoughts?

Good, and with that, thank you very much. We will take a 15 minute recess and then convene the next panel.

(Recess)

CHAIRMAN LENHARD: We will reconvene the meeting of the Federal Election Commission for October 17, 2007.

We have our third and final panel today which consists of Jessica Robinson, here of behalf of the American Federation of State, County and Municipal Employees. And Paul Ryan, who is here on behalf of the

Campaign Legal Center.

You will have five minutes for an opening statement at the beginning. We have a light display in front of you. The green light will be on during your five-minute time period until the last minute at which point it will begin to flash with 30 seconds left. The yellow light will come on and a red light will indicate that your time has expired.

We will go alphabetically. And with two people whose last names begin with "R" so we will go by the second letter, so Ms. Robinson you get to go first and Mr. Ryan will follow.

Ms. Robinson, you may proceed at your convenience.

MS. ROBINSON: I am delighted to be here on behalf of the 1.4 million members of the American Federation of State, County and Municipal Employees.

I hope I can be helpful to you in conforming your regulations to the Supreme

Court's decision here in WRTL II.

I have to say I was surprised at the breadth of the court's decision. And I would urge the Commission to resist any attempts to narrow it or constrain the amount of speech that is protected under the court's opinion. Which brings me directly to the proposed safe harbor for grassroots lobbying communications.

I find the idea of a safe harbor very appealing in theory, but I do worry about how it may be applied in practice.

My fear is that when the government tells you that there is a permissible way of speaking that it becomes the only permissible way of speaking and that it becomes a device for shifting the burden from the government to the speaker.

A union or corporation may run an ad that is not the functional equivalent of express advocacy, but because it doesn't fall within that safe harbor they are left dealing

with complaints explaining why protected speech is protected speech or they are left responding to complaints and explaining why their protected speech is protected speech.

You may not view this as a huge burden for unions and corporations, but I want to remind you that there are a lot of small local unions without in-house lawyers who have to waste their resources paying for a lawyer to explain to the government why lawful speech is lawful speech.

In my experience the lesson learned in this area by those with limited resources is not to speak or to speak only in the way the government says is appropriate.

What I'm getting at here is that I think the proposed safe harbor for grassroots lobbying communications is too narrow.

That is not to say that the entire universe of communications protected under WRTL II should fall within the safe harbor.

But if the Commission is going to

take the time and effort to draft and prepare a safe harbor and codify it, then you should at least make it useful to the people it is supposed to protect.

It should be more of a shield for the speaker and less of a sword for the censor.

Along that line, I would also urge the Commission to reject proposals to specify in the rules discrete content constituting strong evidence or some other term that would specifically say when an ad is not protected by WRTL II unless it is express advocacy.

I don't really see any reason to adopt that type of language unless the purpose of it is to create a presumption of guilt on the part of the speaker that has to be rebutted, which I believe under WRTL the court clearly states that it is the burden of the government to show that they have a compelling interest in regulating a particular ad.

On the matter of whether to adopt Alternative 1 or Alternative 2 for disclosure, AFSCME supports the option of Alternative 2.

My colleague, Larry Gold, did a fine job of explaining our position on that point. I just want to press the point that the jurisprudence in this area shows that mandatory disclosure is generally limited to disclosing funds used to pay for ads that are regulable by the government.

If the Commission decides not to adopt Alternative 2 and instead adopts Alternative 1, I beg of you to simplify the disclosure requirements.

Again, Mr. Gold did a good job in presenting to you the issues in this area. It is really the broadth of the definition of donation. What is a donation? Is it interest? Is it royalties? Is it dues?

I don't want to get into the arcane complexities of dues structures for labor

unions, but when you're using dues to report that they were spent for something it is hard to identify who the donor is.

Is it the dues payer or is it the affiliated labor union who's required to pay per capita taxes? The easiest way to address these issues is to require reporting only for those people who earmark funds to be used for WRTL II type communications and other funds should be reported just as a donation of the labor union.

CHAIRMAN LENHARD: Thank you. Mr. Ryan.

MR. RYAN: Thank you, Mr. Chairman and fellow commissioners, it is a pleasure to be here this afternoon on behalf of the Campaign Legal Center.

There are two issues that I believe are key issues in this rulemaking and I want to address both of them briefly in my opening remarks.

One is the question of whether to

exempt WRTL type ads from the BCRA disclosure requirements. The second one is whether the WRTL decision requires a change to the FEC's definition of expressly advocating found at Section 100.22 of the Commission's regulations.

With respect to the first point, the disclosure point, commenters proposing exempting WRTL type ads from BCRA's disclosure requirements through this rulemaking include on the one hand the Center for Competitive Politics, Professor Allison Hayward, who you heard from this morning, and Mr. Bob Bauer, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee.

And on the other hand you have a group with which this first group very rarely agrees on matters of campaign finance law.

You have Senators McCain, Feingold, Snowe, and Representative Shays. You have my organization, the Campaign Legal Center,

which filed comments jointly with Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters, and USPERC, you have public campaign, you have public citizen and now you have Professors Hasen and Briffault.

These commenters undoubtedly have varying opinions regarding how the Supreme Court would and should resolve a legal challenge to BCRA's electioneering communication disclosure requirements, but there are two things they all agree on.

One, that the Supreme Court in McConnell upheld BCRA's electioneering communications disclosure requirements against facial challenge by a vote of eight to one.

Two, BCRA's electioneering communications disclosure requirements were not challenged in WRTL and consequently the Supreme Court did not consider or decide the legal question of whether WRTL type ads may

constitutionally be subject to disclosure requirements.

Indeed, WRTL's complaint stated explicitly, "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications. Only the prohibition on using its corporate funds for its grassroots lobbying advertisements."

This is a point that was repeatedly stressed by WRTL in its brief to the Supreme Court. It was also raised in oral argument.

Mr. Bopp assured the court that WRTL's challenge to the statute, if successful, would leave a fully transparent system.

In addition to these widely agreed upon facts, namely that the plaintiff in WRTL did not challenge the disclosure requirements, the WPTL court did not address the constitutionality of these disclosure requirements, and the McConnell court by a large majority specifically upheld the

constitutionality of these disclosure requirements, the Campaign Legal Center urges consideration of three other reasons why the Commission should refrain from and not alter BCRA's disclosure requirements in this rulemaking.

First, fundamentally different constitutional tests apply to funding restrictions and disclosure requirements.

Whereas a reporting requirement is constitutional so long as there is a relevant correlation or a substantial relation between the governmental interest and the information required to be disclosed, a restriction on political spending is constitutional only if it meets the more rigorous strict scrutiny requirement of being narrowly tailored to further a compelling government interest. That is the first reason.

The second reason is that broader different governmental interests, public information interests as opposed to the

Austin-type corporate corruption interest, support disclosure requirements.

Third, the burden on those subject to disclosure requirements is lesser than the burden on those subject to restrictions on expenditures.

As the Buckley court stated, "unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities."

The Buckley court noted that, "disclosure requirements, certainly in most applications, appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."

I will conclude this first point by taking a welcome opportunity to quote Allison Hayward's comments because it's a very rare occasion that we actually agree with one another on anything regarding campaign

finance law.

Professor Hayward wrote in her comments, "the Commission should promulgate regulations to reflect this opinion and not venture to predict how or whether the court would extend the same analysis to disclosure laws which are typically subject to less rigorous scrutiny. It is better for the Commission's litigation record and more appropriate to its role as a federal agency to adopt a rule that hews closely to the court's holding."

With respect to the second question, whether the WRTL decision requires a change to the FEC's definition of expressly advocating in Section 100.22 of the Commission's regulations, the Commission correctly notes in the NPRM that the court's equating of the functional equivalent of express advocacy with communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or

against a specific candidate bears considerable resemblance to components of the Commission's definition of express advocacy and the Campaign Legal Center agrees with this.

Sub Part (b) standard of the Commission's regulations are virtually identical and indistinguishable from the WRTL test.

The Commission has been applying this test recently in the context of 527 enforcement actions and we think the Commission has got it right in that respect with regard to the 527 conciliation agreements, and we encourage the Commission to interpret this decision as an affirmation of the constitutionality of the sub Part (b) express advocacy test.

Thank you and I look forward to answering any questions you might have.

CHAIRMAN LENHARD: Thank you. Questions from the Commission? Commissioner

von Spakovsky.

MR. von SPAKOVSKY: Ms. Robinson, I should have said this when Mr. Gold was here also, since I think he was involved in drafting this comment.

But as an undergraduate of MIT, I very much appreciated the comment where he said that if we define a classic communication that lies between express advocacy and the universe that would be the equivalent of the Dark Matter of the universe, and I thought that was a very interesting comment.

My question is, you were worried in your testimony about the safe harbors becoming basically the only way to fit within the exemption.

If we added language that said something like, "among communications that satisfied the exemption are the following," or "within these paragraphs" or after giving an example of safe harbors, saying something

like, "although a communication may be a permissible communication even if doesn't satisfy under safe harbor," would that go a long way towards satisfying your concern or worry about that?

MS. ROBINSON: I certainly think that would be helpful. In a preface to the safe harbor you said that the whole of WRTL II communications is not reflected by the safe harbor.

I would also appreciate a statement that makes it clear that the burden is on the Commission to show that the communication is not protected in WRTL II.

CHAIRMAN LENHARD: How would we do that? How do we prove that there is no possible reasonable interpretation? There is no way to prove the negative.

It's a practical problem that I struggled with a little bit as we were drafting this thing. I think your interpretation of what the Supreme Court is

telling us is true, but in terms of as a practical matter, as we task our lawyers to brief this up for us, it does present them with a particular problem that it's hard to figure out how they would solve.

MS. ROBINSON: It is. It's a difficult task that you have and I do not know how to prove a negative. I have had experience where that has been the task that has been placed before me by the Commission, so I can tell you that it is a very hard thing to do.

In drafting a safe harbor, if you're going to do that, then a good thing to do is to use some examples. It's impossible to show never, especially when you're stuck with this situation where there is a reasonable interpretation involved.

CHAIRMAN LENHARD: I was just being hopeful given Commissioner von Spakovsky's reference to the Dark Matter that there might have been a breakthrough.

Mr. Ryan, I have a question for you. Mr. Bopp's approach to us is somewhat more subtle. It's certainly odd to use that reference considering Mr. Bopp's testimony earlier today, but his point is, which is not so much that that's a matter of constitutional law Congress could not pass a disclosure regime for these sorts of communications, but that in briefing this matter up to the Supreme Court he was seeking as an applied challenge for which he thought he would get an exemption from the electioneering provisions.

Instead what he got what he interpreted to be a redefinition of what an electioneering communication was, and as a consequence, as a matter of policy, it is reasonable for us to take the definition of what constitutes an electioneering communication and take those things that fall outside of it and have them simultaneously fall outside of the disclosure regime, and

consequently, as has been pointed out by the commenters, the coordination regimes and that this is entirely appropriate as a matter of policy because the court has highlighted that these ads consist in many cases of lobbying communications that would not normally be regulated by the Federal Election Commission or genuine issues speech which also but for their timing in reference to the candidate would not be regulated by us either.

It's much more out of a sense of a desire to fairly interpret what the Supreme Court is doing and also to cleave to the policy, goals, and guidelines that Congress has set for this agency that animates or motivates the thinking about whether the changes to the regulations that flow from this decision should fall into Section 114 on the regulations of expenditures by labor organizations and corporations or in the definitions of what constitutes an electioneering communication.

And in your comments you focus on the constitutional concerns, as did a number of other commenters, because I think what was sort of animating our thinking in this probably wasn't as apparent from the notice of proposed rulemaking as it could have been.

But I'd like you to turn to that problem, which we discussed with the panel a little earlier and whether the court isn't really in Wisconsin Right to Life telling us what an electioneering communication is, and then, as a consequence it would be that these things are not electioneering communications and that they should appropriately fall outside of our regime for electioneering communications.

MR. RYAN: This particular disagreement between Mr. Bopp's position and the Campaign Legal Center's position relates perhaps in large part to our understanding of what the court did.

I believe the court did not hold

that WRTL's ads were not related to an election. Instead the court held that WRTL's ads are susceptible to another equally reasonable interpretation and that such dual interpretation ads cannot constitutionally be subject to BCRA's spending or funding restrictions.

The court gave no indication as to whether dual interpretation ads could constitutionally be subject to disclosure requirements.

They did address that issue in McConnell and in McConnell the court held that on its face any ads that meet the definition could be subject to the disclosure requirements in BCRA.

So at the end of the day there is a temptation here by Mr. Bopp and others to say these ads raised in WRTL, these are grassroots lobbying ads. These are not in the election ad box.

What I think is more accurately is

the case is that these are dual interpretation ads. These are ads that were argued all the way up to the Supreme Court as having at least a purpose in influencing elections. And Mr. Bopp arguing on the contrary, no, they are grassroots lobbying ads, and then in oral argument I believe Seth Waxman addressed this point explicitly on behalf of the intervenors in the case that our position in the case -- and by "our" I mean the defendant intervenors, and I was part of that legal team although I am not representing them here today -- but our position in that litigation was that, when dealing with dual interpretation ads, we believe they should be subject to both the funding restrictions and the disclosure requirements.

Mr. Bopp's position in that litigation on behalf of his client was, we're not challenging the application of the disclosure requirements to such dual

interpretation ads. We are challenging funding restrictions and they should not be subject.

The court only ruled on that funding restriction piece of this. The court has not said that these ads are not related to an election.

CHAIRMAN LENHARD: That's interesting because while the ads are susceptible to many interpretations, my assumption has been that the organization that are funding them, some of them are funding them for lobbying purposes and some of them are funding them for issues purposes and some may be funding them for electoral purposes, but given the text of the ads it is not possible to discern that, and as a consequence, there are multiple interpretations, but there is some driving impetus in these organizations and it may be in some cases they have multiple purposes.

MR. RYAN: If I may respond to

that, briefly. I was here this morning when you and Mr. Bopp had this conversation.

And Mr. Bopp challenged your use of the terms "intent" and "purpose." He said the court made clear that that can no longer be considered.

I want to be abundantly clear that we are not suggesting that these are dual purpose ads in the aftermath of WRTL.

I am referring to these ads as dual interpretation ads. And Congress that made the determination, when they passed this statute, that it believed that any ad that met this statutory definition of electioneering communications had at least as one of its reasonable interpretations as influencing elections or advocating the election or the defeat of a candidate.

I think that's what this Commission is left with. You are left with Congress's intent to require disclosure of any ad meeting the definition and the Supreme Court

considering the application of that definition in a narrower or in different context, which is the funding restriction.

CHAIRMAN LEMHARD: Vice chairman Mason.

VICE CHAIRMAN MASON: Mr. Ryan, I wanted to ask a question about something Ms. Robinson brought up that is essentially from your joint comments that I thought was an interesting point, and that is this "strong evidence" rule.

Doesn't that in effect become a chill, and in fact, isn't it kind of intended to be a chill? To put people on notice, that, well, you better not say that? Because isn't the likely effect of someone using some of the words that constitute "strong evidence" to be that they'll have a complaint filed and be subject to investigation by the government?

MR. RYAN: I'm not sure the extent to which speech would be chilled, but I will

say that --

VICE CHAIRMAN MASON: Oh, come on.

MR. RYAN: -- a plain reading of Chief Justice Roberts's opinion is that you have this sort of two-tiered test.

You have the umbrella test and then you have the specific characteristics of Wisconsin Right to Life's ads that led the Chief Justice and his colleagues who signed his opinion to reach the conclusion that those specific ads were exempt under the umbrella test.

I believe that there is some distance between the safe harbor, the exact criteria of Wisconsin Right to Life's ads and the broader umbrella test.

I don't know exactly how to measure that distance, or what it is, but I do know that Chief Justice Roberts articulated in his test several indicia of express advocacy and indicated that the absence of these is one of the very important criteria that led him to

reach the conclusion he reached.

VICE CHAIRMAN MASON: But, but --

MR. RYAN: The converse of that -- allow me to just finish, very briefly -- is that in the presence of such indicia of express advocacy we aren't sure how Chief Justice Roberts would have come out.

VICE CHAIRMAN MASON: But that leads to exactly the issue that Ms. Robinson brought up. You know, I had asked the questions before in terms of a balancing or something like that.

The problem I see with the approach you are suggesting is not that they are not two different things. They clearly are. There's the general test and the application. There clearly are some ads that will not meet the same application, but will be protected by the general test. Everybody agrees with that.

The trouble is that by introducing this "strong evidence" concept you do what

Ms. Robinson fears, which is you push everything back into the safe harbor and you rob the general test of its meaning.

When you say you don't know, I mean, I think we frankly do know in the real world, and your organization will be out there and other organizations will be out there, ready to file complaints, which is your right, okay, but that is why I am asking what is the basis for this "strong evidence" test and isn't that, in fact, going to throw a chill on people? And isn't it intended to do that? Just kind of push people back, and say, look, if you say this, you know, you're going to be subject to government scrutiny.

MR. RYAN: I strongly suspect that Mr. Bopp wrote, along with his clients, or he advised his clients to write the ads they wrote for a reason.

Mr. Bopp, I suspect, was looking for ads that he thought he could get in --

VICE CHAIRMAN MASON: I am not asking about

Mr. Bopp. I am asking about the test that your organization has propounded and why you are supporting that test.

MR. RYAN: Because in the absence of that "strong evidence" test it is quite possible that ads that Chief Justice Roberts himself indicated, the Jane Doe type ads, could be exempt under the umbrella and push well beyond.

I mean, this margin that we are talking about between the safe harbor and the umbrella, is really a margin of where groups will be pushing beyond what Wisconsin Right to Life wanted to do and beyond what the Supreme Court, the actual ads before it that the Supreme Court considered an as applied challenge.

Certainly, to be clear, the court's umbrella test is slightly broader than exactly what Wisconsin Right to Life, the characteristics of its ads, but we do not know what the difference is and how much room

there is.

This Commission, for better or worse, has been charged with employing this no reasonable interpretation test at the end of the day and yeah, there's been discussion of burden shifting.

My understanding, given the way this Commission's enforcement process works, is that the Commission always bears the burden of proving, whether in the context of attempting to convince an organization or persons entering into a conciliation agreement, or, if that is unsuccessful, convincing a court that the Commission is in the right and that there is no reasonable interpretation another than for a particular item.

The burden is clearly still on the Commission to do this, but again, not having this "strong evidence" elements that we propose in our comments. I think leaves open the distinct possibility that Jane Doe type

ads, which Chief Justice Roberts explicitly distinguished Wisconsin Right to Life's ads from, could possibly get in under the umbrella with very little consideration.

We are simply urging the Commission to take into consideration whether or not the ads before the Commission possess some characteristics that the court in Wisconsin Right to Life did not consider and to exercise your judgment as you did in the 527 enforcement actions.

You exercised it well in those capacities and as Don Simon said earlier, keep doing what you're doing as far as the outcomes you have reached with regard to those ads.

VICE CHAIRMAN MASON: I am glad you think so because Mr. Witten was not persuaded.

MS. ROBINSON: I just want to comment on a point that Mr. Ryan made. I do not believe the Chief Justice applied a two-step test in the case.

I believe he used a one-step test and that test was whether or not the ads at issue were susceptible to a reasonable interpretation as something other than an appeal to vote for or against a candidate.

The indicia of express advocacy and the characteristics of grassroots lobbying ads were characteristics of the specific ads at issue that he thought made it clear that they didn't fall within that, but those indicia and those characteristics were the specific tests that Mr. Bopp proffered to the court.

Chief Justice Roberts says he rejects that test. Instead he chooses his own one-step test that he felt was more protective of political speech.

I think that, in footnote 7 I believe, makes it clear that the court is not requiring any or all of those indicia or characteristics.

MR. RYAN: In brief response to

that, to the extent that this Commission were to decide that all it wanted to promulgate as a rule was the umbrella test, a one-step test, the Campaign Legal Center wouldn't complain.

We believe that safe harbors provide added guidance and clarity for the regulated community, but we certainly don't think it would be unconstitutional for this Commission to adopt a rule saying, the exemption, the WRTL-type test, is the umbrella and no reasonable interpretation test.

If that's what members of the regulated community would prefer, so be it.

CHAIRMAN LENHARD: This talk about safe harbors and our trying to articulate clearer standards nearly drives me screaming out of the window in part because I so often hear that our standards are vague and unclear, and provide people with no guidance and then we try to provide people with

greater clarity and more guidance and we are accused of corralling speech into these narrow little pens that we are all able to find four or five or six commissioners to agree on.

It's hard because we are trying to provide some clear guidance, and yet, I am very aware that people have different levels of willingness to take on risk.

Some people are very risk-averse and if the government says, if you do the exact three things here, there's no risk of enforcement, that is what they want to do.

Then there are other people who have more willingness for risk and they are willing to do something broader. And then there are some people who are utterly inattentive to risk, so we see them in enforcement.

We were obviously well aware when we put this out that we could simply replicate the Chief Justice's language and be

done with it and that would provide people with no further guidance other than that we were aware that the Supreme Court had issued its decision and we had read it or at least we read that part of it.

So the safe harbors and the wrestling with the factors we know brings both a hope that they are helpful and provide clarity and yet also an awareness that that clarity will lead the most risk-averse to scurry to that protection.

Any there other questions?

Then I will continue. I wanted to ask both of you sort of flip sides of a similar question of the same problem, and I will start with Mr. Ryan.

My question is, is it possible for us to read the Wisconsin Right to Life decision and as a consequence the earlier decisions in McConnell and Buckley as telling us anything other than when we look to define express advocacy we are left with the magic

words test? Is it possible to read Wisconsin Right to Life as leaving more there than that, or is that what the court is telling us?

MR. RYAN: I don't believe that is what the court was telling you and I think a fair reading of the Wisconsin Right to Life decision is that express advocacy language or communications that meet the Roberts test can be treated as express advocacy.

Anything that is express advocacy and/or its functional equivalent may be treated as express advocacy.

CHAIRMAN LENHARD: Before you go on, how do we wrestle our way through that linguistic problem because there must be some difference.

MR. RYAN: I don't think it is a huge linguistic problem. I will use the dreaded word "context" here, and the important context here is in the McConnell decision where the court was discussing

express advocacy and determined or declared that the express advocacy standard was functionally meaningless, I believe the court was referencing the magic words type interpretation of express advocacy.

And I believe the court was doing so because this Commission had not relied upon or enforced sub Part (b) of its express advocacy test in many years and had not done so, to my understanding, since the late 1990s.

In fact BCRA itself was in large part pushed through Congress or enacted by Congress because of the functional meaninglessness of the magic words type express advocacy test.

So in the McConnell decision, I think that is what we are talking about when the court said express advocacy or its functional equivalent, I don't think it was envisioning the sub Part (b) test as part of what it meant by express advocacy.

CHAIRMAN LENHARD: But doesn't that make our problem harder because they are doing so in the context of interpreting a different set of statutory language where Congress has sort of set very clear numbers of days prior to the election in which the speech can be regulated, and then very broad content restrictions, so in that context my sense of the McConnell decision was that the court said, well, given these tighter statutory limits, and the fact that the magic words test is functionally meaningless, then Congress can constitutionally regulate more precisely in this other way.

But it leaves us back in the part of the statute that we are enforcing here in terms of just expenditures in general with the earlier statutory language and potentially with the earlier Supreme Court interpretation of express advocacy that is limited to the magic words.

So my concern is that that is what

the Chief Justice was articulating in Wisconsin Right to Life.

MR. RYAN: What is different after Wisconsin Right to Life -- one of the things that's different after Wisconsin Right to Life -- is that up until that point in time we did not have a firm understanding, constitutionally speaking, of the outer bounds of what this Commission may regulate in terms of funding restrictions.

In Buckley we had a statutory phrase in the definition of expenditure that the court found to be unconstitutionally vague and they articulated this express advocacy test in that context.

The court made clear in McConnell that back in Buckley they were not defining a constitutional test there. They were just dealing with an unconstitutionally vague statute and then they sort of set that aside and they said, here we have a statute that is not unconstitutionally vague so we don't need

to necessarily talk about express advocacy in this case. But the test we have here is within the bounds of what is constitutionally permissible in terms of regulating funding restrictions.

And then in Wisconsin Right to Life they were dealing with a funding restriction and they employed what is, essentially, an express advocacy test more broadly defined than magic words.

In the context of defining the outer bounds as to what this Commission can regulate, it went from Buckley, only dealing with express advocacy as a means of construing a vague statute, to McConnell saying, yes, everyone wants to talk about express advocacy and Buckley but this statute is not vague, so we're not going to worry about it here, to Wisconsin Right to Life, saying, yes, this statute is not vague, but as it turns out we are kind of worried about the reach of it. We are kind of worried

about the Commission getting at speech and Congress getting at speech that the First Amendment prohibits it from getting it and declared Congress cannot regulate speech with respect to funding restrictions, that is not the functional equivalent of express advocacy, and then they set forth their test.

That is how I see the sequence of events.

I also want to point out that this widespread belief that the sub Part (b) test was not being relied upon by the Commission and I believe that the court was relying on in McConnell and what the parties were relying on in McConnell, is also reflected in the Shays II litigation.

Getting back to Commissioner Mason, who mentioned my colleague Roger Witten, for the record I also want to make clear that the Campaign Legal Center does not applaud every aspect of the way that the Commission has dealt with 527 organizations, and we have

made our thoughts clear in another arena and in the litigation in that context.

We are happy with the outcome that you have reached with respect to analyzing the text of the ads at issue in those cases.

But, getting back to Shays II. In Shays II, the court's decision early on and the papers filed by the parties in the case largely depended on an understanding and on a presumption that this Commission was only going to rely on express advocacy or on the magic words part of the express advocacy definition.

When the Commission made clear through conciliation agreements as well as through revised explanation and justification that it was, you might say, resurrecting the sub Part (b) standard, the court's concerns were largely allayed at that point for perhaps understandable reasons.

But this resurrection of sub Part (b) is something new and it is important not

to read too much into the McConnell language saying that express advocacy is this, and functional equivalent is this, and now assuming that the Roberts test is something other than and distinct from express advocacy.

CHAIRMAN LENHARD: Ms. Robinson, the other side of the coin is, if Mr. Ryan is wrong and you are right, do we find ourselves in the position where we are left with a test of express advocacy which the Supreme Court in the McConnell decision considered to be functionally meaningless?

MS. ROBINSON: Well, I guess what I would say about that is that it may be functionally meaningless but it is legally significant.

What the court is getting at here is you have these ads that basically do the same thing. You have these ads that are magic words and you have these ads that are not.

Take the Yellowtail ad, for instance, is what the court used as an example of something that was not magic words, but would be regulated under the electioneering communications provision, and the court said the distinction between magic towards and Billy Yellowtail is functionally meaningless.

The significance here is, one of them, you have this vague statute that is construed very narrowly so that the Commission or the government cannot reach speech that may be campaign-related but the public is not advised about where the line is drawn. So here you have this.

The court knew in Buckley, they said explicitly that they realized that there were going to be a lot of ads that were campaign-related that this wasn't going to reach. Then you get to McConnell and the court said you know, we realize this distinction is functionally meaningless.

That's the reason that Congress can use this new standard that is easily understood and objectively determinable to regulate those ads.

Congress can always go back and amend FECA to make it also the definitions of expenditure and contribution to a political committee to make those easily understood and objectively determinable, but until they do that you are stuck with magic words.

In this new area, which Congress specifically identified as an attempt to regulate beyond express advocacy, that's where you get your functional equivalent of express advocacy. Because it was a construction on the statute that was already easily understood and objectively determinable.

CHAIRMAN LENHARD: Vice chairman Mason.

VICE CHAIRMAN MASON: The functional equivalent of a non-functional test. That's

our problem.

CHAIRMAN LENHARD: It defines it.

VICE CHAIRMAN MASON: I suppose the other legal category out there that all the lawyers are taught to think badly of are formal tests. And I think that's sort of the clue to the riddle, that express advocacy is a formal test. The converse of a functional test isn't a non-functional test. It is a formal test.

Let me ask Ms. Robinson about dues. I take it that the monthly dues of a typical individual member is less than $100.

MS. ROBINSON: I would say it depends from union to union. I know that we certainly have members who pay dues that would have to be disclosed on an electioneering communications report.

VICE CHAIRMAN MASON: So there are members, in other words, whose dues are in excess of $85 a month, or whatever it would be, and more than $1,000 a year.

MS. ROBINSON: Yes.

CHAIRMAN LENHARD: Certainly in Alpha, the airline pilots would, because they all make a lot of money. Or the Screen Actors Guild.

MS. ROBINSON: AFSCME certainly represents doctors and dentists and college professors.

VICE CHAIRMAN MASON: I always thought of union workers as --

CHAIRMAN LENHARD: Most are, but there are these pockets.

VICE CHAIRMAN MASON: The question I want to get at and I think there is an answer to this, but I would like to try to get your help.

How in carving out an exemption for dues payers would we address the problem of the Wyly brothers? I am very sympathetic, too. I think they were trying to do a nice thing or at least what they thought was a public-spirited thing.

What if Republicans for Clean Air filed itself a charter, and said, to be a member of the Republicans for Clean Air all you have to do is pay dues of $500,000 a year.

And the two brothers sign up and they are dues paying members. Now how do we deal with that, because we have these inventive people who out there who try to use every tool they can to promote their speech interests?

MS. ROBINSON: I suppose one thing you would look at is donative intent. Assuming the Republicans for Clean Air, whoever they are, they meet your test for membership organization so they are not formed for the major purpose of supporting a candidate for a political office. I mean it's difficult if the organization does something else.

Union dues, they are not donations because they are required for union

membership. So one of the ways you would look at it is you would look at the intent of the members of Republicans for Clean Air. Are they doing it so the organization can pay for electioneering communications?

VICE CHAIRMAN MASON: It's one of those things that we would have to get into discovery for and that would be a bad thing.

MS. ROBINSON: This is quite true. It's a dilemma.

CHAIRMAN LENHARD: It's hard here.

MS. WEINTRAUB: It also sounds like intent-based test.

CHAIRMAN LENHARD: We are doing that on the solicitation side and for solicitation it says that the purpose of a solicitation, the words -- we are looking at the speech, yes, the specific speech that's used to discern what was the purpose of the solicitation.

VICE CHAIRMAN MASON: Think about that and see if you can provide us with any help. I'm

in agreement on legitimate dues, that it would be a good thing to exempt, but it is too easy for me to imagine someone coming up with a membership organization with a dues structure that I've described, and they'll probably have a list of benefits and governing documents that comply with our membership organization rules.

CHAIRMAN LENHARD: Are there further questions? Vice chairman Mason.

VICE CHAIRMAN MASON: Would the two of you address the Ganske ad? This is the one that says, "It's our land, our water. America's environment must be protected. But in just 18 months Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions.

Call Congressman Ganske. Tell him to protect America's environment for our families, for our future."

Is that a prohibited electioneering communication or not under the WRTL test?

MS. ROBINSON: I certainly don't think it is. I assume that there are people, probably reasonable people, that would interpret it as an appeal to vote for or against Greg Ganske.

I view myself as a reasonable person and I can interpret it as something other than as an appeal to vote for against him.

In looking at WRTL II, I really don't see anything in the case that says you cannot compare your position with the candidate's. Or you cannot create a sense of urgency about a legislative vote that is about to be cast. Or you cannot engage in hyperbole. I think that there are at least two ways to interpret that ad.

MR. RYAN: I, by contrast, do not believe the Gansko ad would be exempted and certainly not exempt under the safe harbor that contains an indicia of express advocacy which would disqualify it from the Safe Harbor Act as the Commission has proposed in the NPRM.

Beyond that, I would characterize it as really the classic Jane Doe ad and as a personal attack on the character of the candidate identified.

This is an ad of the sort that the under umbrella test it's going to depend on who is doing the reasonable interpreting. I don't think the ad is susceptible to any reasonable interpretation other than as an effort to oppose a candidate.

VICE CHAIRMAN MASON: What makes it an attack on his character? That was the term you used. Or I suppose, under the Roberts test, qualifications or fitness for office?

MR. RYAN: I would point to the

language saying that he took campaign contributions in exchange for his votes which is an attack on fitness for office, I think pretty clearly.

The ad essentially says that he supports cancer, because after all he voted to let corporations continue releasing cancer-causing pollutants.

This ad is very different from Wisconsin Right to Life's ad. It is also very different from the Christian Civic League of Maine ads that were at issue in other related litigation here.

VICE CHAIRMAN MASON: I understand that, but what I am trying to understand is, it's interesting to me that people seem to disagree about whether Chief Justice Roberts intended Jane Doe to be in or out. How would we draw a line between this and any other very pointed criticism of an officeholder's votes?

The fact that he voted to continue

to let corporations release cancer-causing pollutants, that's probably a factual statement that can be caveated with how many parts per billion or whether there could have been competing proposals. And the environmental groups could have had a proposal up there that could be characterized that way because it wasn't a zero threshold, right? So how do we make that distinction?

MR. RYAN: One of the most difficult issues facing the Commission now in the aftermath of WRTL is drawing that line if it is possible to draw a line between criticizing and condemning.

I am one of those who believes that Chief Justice Roberts intended for Jane Doe type ads to be out. He mentioned Jane Doe ads and distinguished Wisconsin Right to Life ads from Jane Doe ads for a reason. It is important not to ignore that reason.

This is going to be an ad of the sort that creates a challenge for the

Commission that will come down to whether there is a majority of commissioners who believe that there is a reasonable interpretation other than.

CHAIRMAN LENHARD: But the thing we are struggling with is just this. We talk about who is the reasonable person here and we also speculate about what the court is going to do on the next challenge which isn't very helpful, I mean in terms of the fact that it is not predictable.

But none of us feel particularly comfortable with the idea that there are five or six of us who are going to sit up here as some kind of jury of reasonable persons rendering these decisions.

Because all of us, even when we disagree about the applications, would like some standard that we could look at and render and that people would actually, you know, a vast majority of at least, let's say, people who are trained in the area, would be

able to look at it and render an opinion and do it reliably so.

MR. RYAN: I humbly submit that your complaint should be directed at Chief Justice Roberts and not at me.

Chief Justice Roberts gave you that standard. The Ganske ad is not about the environment as an issue. It's about Ganske. It's an attack on him. It is not an effort to lobby him. It doesn't even mention a piece of legislation.

This may be one of those ads where you're talking about a difference in degree as opposed to a difference in kind that makes the difference between an acceptable statement of a candidate's position on an issue versus condemnation of that individual, that candidate.

VICE CHAIRMAN MASON: Isn't that kind of like the dues thing, in the sense that there's an easy way around it. "Call Congressman Ganske. Tell him to protect America's

environment. Tell him to support HR 1234."

MR. RYAN: I'm not submitting that that's the only magical element, the mention or the lack thereof of a piece of legislation, but when looking at the text of this ad it certainly --

VICE CHAIRMAN MASON: Oh, I understand, but the text of this ad would be changed materially.

In other words, if you talked about his prior votes on environmental issues and how he basically voted wrong on the environment and how much that hurt the environment and the families in Iowa, and so on like that, and that there was this bill pending, that would make it all better, and by calling and telling him to support that, seems to me changes the character of the thing pretty dramatically.

MR. RYAN: Are you calling me unreasonable?

VICE CHAIRMAN MASON: No, not at all. I am

just saying this is our problem in rendering this. I am trying to see if you can help and if there is a good solution.

MR. RYAN: That's why we supported the Bright Line test of the statute and we didn't advocate its curtailment through the Supreme Court's decision.

I look forward to seeing how you do resolve these issues, but the simple fact is that it is your burden and responsibility to.

MS. ROBINSON: I will just remind you that "the tie goes to the speaker."

CHAIRMAN LENHARD: That's what I wanted to get at because we did lose that case. We lost the Bright Line and we are living with the aftermath.

You had mentioned something which we have also struggled with internally and a part of what you are watching is sort of the debates and struggles that we have had internally over how to interpret these things.

It goes to that question of the language in the decision where the Chief Justice talks about the tie going to the speaker and the question is, do we really need to find four votes to resolve whether this particular ad is or is not protected speech or does the presence of even a single reasonable voice teach us that that's the end of the inquiry and that we should approach these cases really significantly differently because of this notion that to the degree that one cannot clearly discern this, that the regulatory machinery must stop.

MR. RYAN: When the question is posed to me, I am the reasonable person, I am in those shoes. To me, it is not a tie.

If I were a commissioner I would say, "No, this is not a tie," and I would cast my vote for this ad not being exempt. I don't think there is anything in the statute that created the Commission and the regulations that govern its procedures, but

perhaps you need a change in the statute from Congress or a change in your regulations to say, "One vote is enough to block something."

But the way the Commission currently operates is that it would be necessary for four commissioners to in their own minds view this as either a tie or as clearly susceptible to a reasonable interpretation other than as an attempt to influence an election and then you have got four votes.

CHAIRMAN LENHARD: Certainly we will have a statutory requirement that it takes four votes to proceed on any matter, but we are also interpreting a test which says to the degree that a reasonable person can construe this as something other than a call to elect or defeat a candidate, then it is protected speech.

And there appears to be a reasonable person who is sitting next to you at the table and you sort of listen to those

arguments and you don't believe that that is the correct outcome, but it doesn't seem like the person voicing them was unreasonable. And doesn't that under the Roberts test lead you to conclude that a reasonable person has in fact construed that this is something other then a call to vote for or against, and doesn't that, because of the nature of the test, have to guide your thinking about how you cast your vote?

MR. RYAN: I certainly do not want to make about the person who is sitting next to me at the table. I will stick to my initial position that I do not believe there is a reasonable interpretation other than.

And to the extent that some of your colleagues can convince you otherwise and you change your mind and it pulls you from being on the fence to a tie and you change the way you want to vote, then so be it.

CHAIRMAN LENHARD: I didn't mean to single you out. I actually do what the

people up here do. I will let Commissioner Weintraub ask her question and then you can then follow up.

MS. WEINTRAUB: Just a follow up. I am deeply disappointed that the vice chairman doesn't appear to think that the five of us are the epitome of reasonable people. We were what they were thinking of when they invented the reasonable person test.

VICE CHAIRMAN MASON: Oh, I don't think so. I have great affection for my colleagues, and respect too, but I don't think that is the case.

MS. WEINTRAUB: No? I am just so disappointed. I want to push Mr. Ryan a little bit on what he just said, that he doesn't think there is any way of reading this other than as a call to vote against Congressman Ganske.

What if this precise text, word for word, no changes, is run in January of a

non-election year and there's a big environmental bill about to come up on the floor? Would you still say, with an election almost two years out, that running this ad, there is no reasonable way of interpreting it other than as a call to vote against him two years from now?

MR. RYAN: That's a great alteration of the hypothetical, or actual ad.

MS. WEINTRAUB: No, I am not changing the words at all. I am just asking how in any way that these words can be read with a reasonable interpretation of something other than a call to vote against him?

MR. RYAN: I will say, given that I took such context into such small consideration in rendering my initial opinion, I would say that-that doesn't change the outcome, but I am certainly willing to give it some thought.

I will take the same position that my predecessors on the previous panel who

requested additional time to think about hypotheticals and changes that were not presented in the NPRM II, to perhaps get back to you, but my initial response is I wasn't taking proximity of the election into consideration when I was initially asked whether this is in or out, and so your shift of a hypothetical to further from the election I would say initially that, no, that that doesn't change my response. That's the safe response.

CHAIRMAN LENHARD: Mr. Bopp would applaud your lack of consideration of context. Ms. Robinson, you had sought recognition before.

MS. ROBINSON: Yes, but now I can't remember what it was about.

CHAIRMAN LENHARD: It happens to all of us. We will move on and if it comes back to you, just give a signal. Commissioner Walther.

MR. WALTHER: I would like to ask

for an opinion from either one of you about guidance that we might get on ads that do not convey a verbal message but by the image convey a very strong message.

When you at look at some these ads, all that we talk about here is what we read and what we say, but in some cases, and I always hearken back to this example, for those of us who are old enough, about the Goldwater ad back in 1964, where they had this little girl picking petals off a flower and in the background was this mushroom cloud done in a black and white movie that sent out a very dark scary picture and it really made it all clear without any words pretty much, what that was all about, given the context.

Maybe you could have a word or two and consider what Senator X is thinking about what you just saw.

And now I am asking if you have any suggestions on how we've got to articulate how take those factors into account when you

know that one picture is worth a thousand words and certainly this is all about television, that we're regulating what is broadcast.

MS. ROBINSON: In thinking about the daisy ad, and I think I remember the whole thing, I would have to say in looking at that, that it is not the functional equivalent of express advocacy.

MR. WALTHER: Without just picking that ad, how can we articulate powerful messages conveyed visually?

MS. ROBINSON: I suppose it would be the same way when you look at the text.

MR. WALTHER: When the words are fairly anemic, without the visuals.

MS. ROBINSON: Right. It would be the same thing if you looked at an ad with text and considering the four corners of that ad, does it convey to you a message that is something other than --

MR. WALTHER: The functional

equivalent of express advocacy?

MS. ROBINSON: Right.

MR. WALTHER: So it could be where we're really not talking about express advocacy, then visually.

MS. ROBINSON: Right.

MR. WALTHER: Essentially.

MS. ROBINSON: Right.

MR. RYAN: I haven't really given much thought to the subject. I will mention that Chief Justice Roberts's test itself uses the words "an appeal" and that's open to interpretation as to whether an appeal can be made visually or must only be made verbally or through print communication.

It's a very difficult question that I don't have an answer to, and particularly with respect to the daisy ad, the mushroom cloud ad.

CHAIRMAN LENHARD: Certainly one would approach it with a great deal of caution in the Fourth Circuit.

Are there other questions, comments, general counsel's office, staff, anyone? Ms. Duncan.

MS. DUNCAN: Yes, thank you. Ms. Robinson, in your written comments you suggested including specific factors in the regulation that the Commission may consider in determining if an ad qualifies for the general exemption and those factors seem to be fairly similar to the prongs of the grassroots lobbying safe harbor.

I'm just wondering as a matter of structure and form why should we list the safe harbor prongs also as additional factors? Is there another benefit to doing that?

MS. ROBINSON: I am not sure that you should list all of safe harbor prongs as additional factors. I would conclude that there are some prongs of the safe harbor that may be left out in developing a safe harbor.

As you pointed out we did not avoid

the hurly-burly of factors when we submitted our comments.

But when we looked at those factors it was an attempt to explain to the Commission how, well, I guess in judging and looking at the factors it's a way to explain how more, even based on factors, can be included within, as Mr. Ryan calls it, the WRTL umbrella, than just those in the safe harbor.

CHAIRMAN LEMHARD: Are there any other questions or comments? From our panelists, any final words?

MR. RYAN: No, but thank you for your attention.

CHAIRMAN LEMHARD: Thank you. This concludes today's portion of our hearing.

I want to express my thanks to our panelists for sticking with us today and devoting the time and energy necessary for all of this, we thank you.

We will now recess and reconvene

tomorrow at 10 o'clock. Thank you.

(Whereupon, at 4:30 p.m., the HEARING was adjourned.)

* * * * *

EXHIBIT E

Democracy 21

Van Hollen Lawsuit Challenges FEC Regulations as Contrary to Law and Responsible for Eviscerating Donor Disclosure

April 21, 2011 Complaints

Successful Court Challenge by Representative Van Hollen Would Provide Disclosure in Future Elections of Secret Contributions Funding Electioneering Communications By Non-profit Groups and Others

Representative Chris Van Hollen (D-MD) filed a lawsuit today against the Federal Election Commission challenging as contrary to law an FEC regulation that has improperly allowed nonprofit 501(c)(4) advocacy groups, 501(c)(6) business associations, and others to keep secret the donors whose funds are being used to pay for "electioneering communications" in federal elections.

The Van Hollen lawsuit was filed in federal district court in Washington, DC.

Representative Van Hollen also filed a rulemaking petition at the FEC today requesting that the Commission revise an existing FEC regulation that is contrary to law and has improperly allowed non-profit groups and others to keep secret the donors whose funds are being used to pay for "independent expenditures" in federal elections.

"Electioneering communications" and "independent expenditures" are defined differently under the federal campaign finance laws and have different regulations to implement their disclosure requirements.

The FEC petition calls on the agency to conduct the rulemaking regarding the disclosure of "independent expenditures" on an expedited basis because it is of urgent importance for a lawful regulation to be in place prior to the 2012 presidential and congressional elections so that citizens receive the basic campaign finance information that they are entitled to have by law.

[Representative Van Hollen filed a FEC rulemaking petition on the "independent expenditures" regulation instead of a lawsuit because the statute of limitations requires the FEC to be given an opportunity to change the "independent expenditure" regulation prior to the filing of a lawsuit challenging it. The same is not true of the regulation on "electioneering communications" which was promulgated more recently and can be directly challenged in court.]

"Improper FEC disclosure regulations are the principal reason that more than $135 million in contributions spent to influence the 2010 congressional races were kept secret from the American people," said Fred Wertheimer, president of Democracy 21.

"The two actions taken today by Representative Van Hollen seek to ensure that nonprofit groups and others making campaign expenditures will not be able to keep the donors funding their activities hidden from citizens and voters in the future," Wertheimer said.

Wertheimer manages and is a member of the Democracy 21 "Project Supreme Court" legal team representing Representative Van Hollen in the FEC lawsuit and FEC petition.

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The explosion of secret money in the 2010 congressional races was triggered by the Supreme Court decision in the *Citizens United*case that opened the floodgates to unlimited corporate spending in federal elections.

The *Citizens United* decision, however, made clear by an 8 to 1 majority that requiring disclosure of the sources of funding for the newly authorized corporate campaign expenditures was not only constitutionally permissible but necessary for corporate accountability. The Supreme Court stated:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."

The public overwhelmingly supports disclosure by independent spenders of their campaign expenditures and the sources of these funds, without regard to party affiliation. According to a *New York Times/CBS* Poll (October 28, 2010) :

> 92 percent of Americans said that it is important for the law to require campaigns and outside spending groups to disclose how much money they have raised, where the money came from and how it was used.

"Almost all nonprofit groups are incorporated and a number of these groups moved quickly to take advantage of the Supreme Court's decision and the improper FEC regulations to inject massive amounts of secret contributions into the 2010 House and Senate races," Wertheimer said.

"History makes clear that secret money in American politics is a formula for scandal and corruption," Wertheimer stated. "If the FEC had done its job properly, we would not be facing, as we are today, hundreds of millions of dollars in potentially corrupting contributions being secretly poured into the 2012 presidential and congressional elections," Wertheimer said.

The Democracy 21 "Project Supreme Court" legal team representing Representative Van Hollen has twice in the past filed successful lawsuits against the FEC on behalf of members of Congress that challenged FEC regulations as contrary to law.

The two lawsuits, *Shays v Federal Election Commission I* and *Shays v. Federal Election Commission III*, resulted in the courts striking down nineteen FEC regulations that were adopted by the FEC to implement the Bipartisan Campaign Reform Act of 2002.

The law firm of WilmerHale, led by partner Roger Witten, is heading the legal team for the Van Hollen lawsuit. Lawyers from Democracy 21 and from the Campaign Legal Center are also members of the *pro bono* legal team for the lawsuit and for the Van Hollen FEC rulemaking petition, which was prepared by Don Simon, outside Counsel for Democracy 21. Former FEC Republican Chairman Trevor Potter, president of the Campaign Legal Center, is also a member of the legal team.

"In 2007, the FEC gutted McCain-Feingold disclosure requirements in a little-noticed rulemaking," according to J. Gerry Hebert, Executive Director of the Campaign Legal Center and also a member of the legal team. "The flood of corporate political spending unleashed by the Supreme Court's 2010 ruling in *Citizens United* made clear the impact of 2007 FEC regulation changes as untold millions of corporate dollars were funneled through the Chamber of Commerce and other groups to avoid disclosure of the source of the funds," Hebert stated.

"Without effective action to close the disclosure loophole opened by the FEC, the American people will continue to remain in the dark about tens of millions of dollars being provided by corporations and others to buy influence over government decisions," Hebert said.

Van Hollen Lawsuit Filed Today

The Van Hollen lawsuit filed today challenges as contrary to law an FEC regulation issued to implement a contribution disclosure requirement enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA).

In BCRA, Congress required any entity which makes expenditures for a broadcast ad that refers to a federal candidate in the period 60 days before a general election or 30 days before a primary election to file campaign finance disclosure reports with the FEC. Such expenditures are known as "electioneering

communications."

Congress provided in BCRA two alternative options for such spenders to disclose the donors funding their "electioneering communications."

If the independent spender pays for the electioneering communications out of a segregated bank account consisting of funds contributed by individuals, the spender can disclose each donor of $1,000 or more to the bank account.

If the independent spender chooses not to pay for the electioneering communications from such a segregated bank account, the spender must disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more" to the spender during a specified period.

"The FEC regulation to implement the contribution disclosure requirements establishes a different approach that is found nowhere in the statute, is contrary to law and has eviscerated the contribution disclosure provision in the statute," Wertheimer stated.

"The regulation resulted in almost no disclosure of the contributions used to finance 'electioneering communications' in the 2010 congressional races," Wertheimer said.

"It is this FEC regulation that is being challenged by the Van Hollen lawsuit," Wertheimer said.

The FEC regulation challenged by the lawsuit requires corporations and labor unions that make "electioneering communications" to disclose donations of $1,000 or more only when the donation to the spender "was made for the purpose of furthering electioneering communications."

Rather than requiring disclosure by an independent spender of all donors of $1,000 or more to a segregated bank account maintained by the spender or disclosure of "all contributors" of $1,000 or more to the spender, as the BCRA statute requires, the FEC regulation requires a spender to disclose only those contributors of $1,000 or more who have manifested a particular state of mind or "purpose" for their donation.

Congress, however, did not include a "state of mind" or "purpose" condition tied to "furthering" electioneering communications in the BCRA contribution disclosure requirement, according to the lawsuit. The FEC, by adding this requirement in its regulation has contravened the plain language and meaning of the statute, the lawsuit charges. And as the record shows, the FEC regulation has all but eliminated contribution disclosure for "electioneering communications."

According to the Van Hollen lawsuit complaint:

> The FEC lacked statutory authority to add the "purpose" element to Congress's statutory disclosure regime for those who fund corporate or union "electioneering communications," and the FEC's regulation adding the "purpose" element is, accordingly, arbitrary, capricious, and contrary to law. Further, the FEC's stated rationale for engrafting a "purpose" requirement is itself irrational, arbitrary, and capricious, rendering it contrary to law.

The lawsuit complaint further states:

> Not only is 11 C.F.R. 104.20(c)(9) inconsistent with the plain language of the statute, it is also manifestly contrary to Congressional intent and has created the opportunity for gross abuse. Congress sought to require more, not less, disclosure of those whose donations fund "electioneering communications." The FEC's unlawful regulation produces a result that frustrates Congress's objective.

The lawsuit notes that in the 2010 elections, corporations "exploited the enormous loophole created" by the FEC's regulation. The complaint states that according to information on the website of the Center for Responsive Politics:

> In 2010, persons making "electioneering communications" disclosed the sources of less than 10 percent of their $79.9 million in "electioneering communication" spending. The ten "persons" that reported spending the most on "electioneering communications" (all of them corporations) disclosed the sources of a mere five percent of the money spent. Of these ten corporations, only three disclosed any information about their funders.

"Not surprisingly, as a result of the regulation, the public record reflects little or no disclosure of the

numerous contributors to non-profit corporations that made substantial electioneering communications in the 2010 congressional races," according to the complaint.

The lawsuit complaint states that according to information on the website of the Center for Responsive Politics the following section 501(c) corporations made "electioneering communications" in the 2010 election and disclosed none of their contributors:

501 (c) Corporation	Amount Spent on Electioneering Communications in 2010 Elections	Disclosure of Contributors Funding Electioneering Communications in 2010
U.S. Chamber of Commerce	$32.9 Million	None
American Action Network	$20.4 Million	None
Americans for Job Security	$4.6 Million	None
Center for Individual Freedom	$2.5 Million	None
American Future Fund	$2.2 Million	None
CSS Ac ion Fund	$1.4 Million	None
Americans for Prosperity	$1.3 Million	None
Arkansans for Change	$1.3 Million	None
Crossroads GPS	$1.1 Million	None

The Center's website lists an additional 15 section 501(c) corporations that made "electioneering communications" in the 2010 congressional elections but disclosed none of their contributors.

The Van Hollen lawsuit requests the court to declare the FEC regulation invalid and contrary to law, and to remand the regulation back to the agency to promulgate a new rule that conforms to the statute and provides for the contribution disclosure that Congress clearly intended.

In light of the failure of the FEC in the past to comply with court orders on a timely basis, the complaint also asks the court to retain jurisdiction over the case "to monitor the FEC's timely and full compliance with this Court's judgment."

FEC Petition

The FEC rulemaking petition filed today by Representative Van Hollen asks the FEC to conduct a rulemaking proceeding on an expedited basis and adopt a new regulation that properly requires the disclosure of donors to entities that make "independent expenditures."

"Independent expenditures" are expenditures made for the purpose of influencing federal elections that contain "express advocacy" or its functional equivalent. These expenditures, unlike "electioneering communications" are not limited to any specific time period and are not limited to just broadcast ads.

Representative Van Hollen has filed an FEC petition regarding the "independent expenditures" regulation, as opposed to bringing an immediate lawsuit, because the six-year statute of limitations has run on a court challenge to the regulation. By filing a petition for a new rulemaking and giving the FEC the opportunity to consider whether to issue a new regulation, a new six year statute of limitation is triggered if the FEC does not act. The same is not true with regard to the "electioneering communications" regulation which was promulgated less than six years ago and is thus still within the statute of limitations for a direct challenge in court.

"If the FEC rejects the Van Hollen petition for a new regulation on disclosure of "independent expenditures" or fails to act on the petition after a reasonable period of time, Representative Van Hollen would then be able to file a second lawsuit against the FEC," according to Wertheimer.

"The lawsuit could challenge as contrary to law the FEC disclosure regulation applicable to independent expenditures, just as Representative Van Hollen's lawsuit today is challenging the FEC contribution disclosure regulation applicable to electioneering communications," Wertheimer said.

The FEC petition filed by Representative Van Hollen states that statutory disclosure provisions require any entity that make independent expenditures to disclose the identity of "each person . . who makes a contribution" to the entity of more than $200, and, in a second overlapping disclosure provision requires the entity to disclose the identity of "each person who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure."

The FEC's regulation implementing these statutory provisions, however, requires disclosure of contributors of more than $200 to the person making the independent expenditure, only where the contribution "was made for the purpose of furthering the reported independent expenditure" (emphasis added).

According to the FEC petition:

> The regulation is manifestly inconsistent with the statute. Whereas the statute requires the disclosure of "each...person...who makes a contribution" of more than $200 to the person making the independent expenditures, 2 U.S.C. 434(b)(3)(A); *see id.* 434(c)(1), the regulation requires disclosure only of those contributors who made a contribution "for the purpose of furthering the reported independent expenditure." 11 C.F.R. 109.10(e)(1)(vi). Thus, the regulation requires far less disclosure than the statute requires. Whereas the statute requires disclosure of all contributors of more than $200 to the person making independent expenditures, the regulation requires disclosure only of those contributors who state a specific intent to fund a specific independent expenditure. Conversely, under the regulation, all contributions to the person making independent expenditures that were not given for the *specific purpose of furthering the specific reported independent expenditure* are not required to be disclosed. This is in direct contradiction to the language and purpose of the statute.

The FEC petition further states:

> The Commission's regulation is thus contrary to the language of the statute and frustrates Congress's intent to require disclosure of the sources of funds used by persons making independent expenditures. The Commission's regulation permits a corporation or labor organization that makes independent expenditures to avoid disclosing its contributors-even contributors who gave money specifically for the purpose of furthering the corporation's or labor organization's independent expenditures. The regulation enables a corporation or labor organization to take the position that the because persons who made contributions to it did not express a specific intent to further the specific independent expenditure that is being reported, no disclosure of such persons is required. As a practical matter, the regulation enables corporations that do not wish to abide by Congress's disclosure requirements to evade them entirely, without fear of sanction.

The petition states that "[n]ot surprisingly, as a result of the regulation, the public record reflects little or no disclosure of the numerous contributors to non-profit corporations that made substantial independent expenditures in the 2010 congressional races."

The petition cites as evidence that according to information on the website of the Center for Responsive Politics the following section 501(c) corporations made "independent expenditures" in the 2010 election and disclosed none of their contributors:

501 (c) Corporation	Amount Spent on Independent Expenditures in 2010 Elections	Disclosure of Contributors Funding Independent Expenditures in 2010
Crossroads GPS	$16 Million	None
American Future Fund	$7.4 Million	None
60 Plus Association	$6.7 Million	None
American Action Network	$5.6 Million	None

Americans for Job Security	$4.4 Million	None
Americans for Tax Reform	$4.1 Million	None
Revere America	$2.5 Million	None

Although Section 109.10 was promulgated in its current form in 2003, 68 Fed.Reg. 404 *et seq.* (Jan. 3, 2003), the insufficiency of the current regulation has been heightened by the *Citizens United* decision. Prior to *Citizens United*, the bulk of independent spending was done by political committees, including party committees, which are required to disclose all of their donors of more than $200 to the FEC, or by 527 groups, which are required to disclose all of their donors of more than $200 to the IRS, or by individual spenders, for whom the donor disclosure issue is largely inapplicable. Thus, prior to *Citizens United*, there generally was comprehensive disclosure of donors to groups making independent expenditures. According to the FEC petition, the CRP website lists an additional twenty-four 501(c) corporations that made independent expenditures in the 2010 congressional elections and disclosed none of their contributors. *Id.* In addition, the CRP website lists the League of Conservation Voters as a section 527 organization that spent $3.9 million on independent expenditures n the 2010 elections and disclosed none of its contributors.

The FEC petition states that the Supreme Court's decision in *Citizens United* to allow corporations to make expenditures in federal elections has opened the door to the use of non-profit corporations as vehicles to hide donors whose funds are used to pay for independent expenditures. The petition states:

> Post-*Citizens United*, however, corporations, including non-profit corporations, and labor organizations are now able to use their treasury funds to make independent expenditures and to contribute funds to other corporations that make independent expenditures. This has created a new universe of independent spenders who can raise and spend contributions from other persons (including from corporations and labor organizations) to finance their independent expenditures. And that development has in turn highlighted the insufficiency and illegality of the Commission's existing regulation on disclosure of contributors to corporations and labor organizations that make independent expenditures.

The petition requests the FEC to amend the existing regulation to require disclosure of all contributions over $200 made to entities that make independent expenditures, as required by existing law.

Van_Hollen_FEC_Complaint_4_21_11.PDF
Van_Hollen_FEC_Petition_4_21_11.PDF
Van_Hollen_Brief_7_1_11.pdf
Van_Hollen_-_SJ_Reply-Opposition_Brief_8_30_2011.pdf

EXHIBIT F

Democracy 21

Federal District Court Strikes FEC Regulation that Gutted Contribution Disclosure By Outside Spending Groups as Contrary to Law in Lawsuit by Representative Van Hollen

March 30, 2012 Van Hollen v. FEC, What's New

A federal district court in Washington, DC today struck down a regulation issued by the Federal Election Commission in 2007 hat gutted the contribution reporting requirements hat apply to groups which make electioneering communications.

"Electioneering communications" are defined in the law as broadcast ads that mention a candidate 60 days before the general election and 30 days before a primary.

The ruling by Judge Amy Berman Jackson came in a case brought against the FEC by Representative Chris Van Hollen (D-MD).

Representative Van Hollen challenged a rule promulgated by the FEC that requires groups making electioneering communications to disclose the names only of their donors who gave "for the purpose of furthering electioneering communications."

This regulation had resulted in widespread evasion of the contribu ion disclosure requirements for groups making electioneering communications.

The lawsuit alleged that this restriction on the scope of the disclosure was in direct conflict with the statutory requirement that a group making elec ioneering communications is required to report all donors of $1,000 or more. The disclosure requirement was enacted by Congress in 2002 as part of the Bipartisan Campaign Reform Act (BCRA), known as he McCain-Feingold law.

The FEC contended that its regulation was required by a Supreme Court decision in 2007 in *Wisconsin Right to Life* that permitted corporations and labor unions to make certain electioneering communications. The FEC contended that the disclosure requirement adopted by Congress had to be modified and narrowed in light of that ruling.

The Court rejected the FEC's position. Judge Jackson said, "There is no question that he BCRA provides that every 'person' who funds 'electioneering communications' must disclose 'all contributors,' and that Congress explicitly defined 'person' to include corporations and labor organiza ions." The Court fur her noted that "there are no terms limiting that requirement to call only for the names of those who transmitted funds accompanied by an express statement that the contribu ion was intended for the purpose of funding elec ioneering communications."

Judge Jackson said that "there is no question that the regulation promulgated by the FEC directly contravenes the Congressional goal of increasing transparency and disclosure in electioneering communications. . . .[T]he general legislative purpose here is clearly expressed and it favors plain iff's interpretation of the statute: that Congress intended to shine light on whoever was behind the communications bombarding voters immediately prior to elections."

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Fur her, Judge Jackson said:

> In sum, the Court finds that Congress spoke plainly, that Congress did not delegate authority to the FEC to narrow the disclosure requirement hrough agency rulemaking, and that a change in the reach of the statute brought about by a Supreme Court ruling did not render plain language, which is broad enough to cover the new circumstances, to be ambiguous. The agency cannot unilaterally decide to take on a quintessentially legislative function; if sound policy suggests that the statute needs tailoring in the wake of *WRTL* or *Citizens United*, it is up to Congress to do it. Because the statutory text is unambiguous, the "judicial inquiry is complete," and the Court need not reach step two of the*Chevron* framework. *Teva Pharm. Indus. Ltd. v. Crawford*, 410 F.3d 51, 53 (2005).

Representative Van Hollen was represented in the case by the Democracy 21 legal team led by Roger Witten and lawyers from his law firm of WilmerHale. Lawyers from Democracy 21 and the Campaign Legal Center also served under the legal team.

According to Democracy 21 President Fred Wertheimer, one of the lawyers in the case:

> The federal district court has spoken clearly and decisively today and found hat FEC regulations have in essence gutted the statutory requirement for groups making electioneering communications to disclose their donors.
>
> Now it is the FEC's turn to act.
>
> Democracy 21 calls on the FEC to conduct an immediate rulemaking procedure.
>
> The FEC must get new rules in place promptly to ensure that outside spenders making electioneering communications disclose the donors funding these campaign related expenditures.
>
> Our legal team will now consult with Representative Van Hollen about a potential second lawsuit challenging the FEC disclosure regulations that have gutted the contribution disclosure requirements for outside groups making independent expenditures.

"Independent" expenditures are defined in the law as expenditures for communications hat contain express advocacy or the functional equivalent of express advocacy.

EXHIBIT G

Democracy 21

Statement of Democracy 21 President Fred Wertheimer on D.C. Court of Appeals Ruling in Van Hollen Case

September 18, 2012 Van Hollen v. FEC, What's New

Statement of Democracy 21 President Fred Wertheimer on D.C. Court of Appeals Ruling in Van Hollen Case

A three-judge panel of the D.C. Circuit Court of Appeals today overturned he federal district court ruling in *Van Hollen v. Federal Election Commission* which had struck down an FEC regulation that resulted in an almost complete failure by groups making "electioneering communications" to disclose any of their contributors to the public.

The District Court had ruled that the law enacted by Congress in 2002 was clear and unambiguous in requiring groups making "electioneering communica ions" to disclose their donors. The district court also ruled that the FEC had created a huge loophole in the disclosure requirement by issuing a regulation in 2007 hat required disclosure only of donors who had given "for the purpose of" funding "electioneering communications." No "for the purpose" requirement is stated in he statute.

The FEC regulations have allowed massive evasion of the contribu ion disclosure requirement by allowing donors to make their contributions that fund "electioneering communications" simply without stating any purpose for the contribu ion. As a result, groups have spent hundreds of millions of dollars on "electioneering communications" while the big-money donors funding these expenditures are hidden from he American people.

The decision today by the Court of Appeals panel wrongly reinstates he flawed FEC regula ion, pending further proceedings before the district court. The Court of Appeals also said the FEC should have an opportunity to revise the regulations by rulemaking. If the FEC chooses not to issue a new rule hen he district court is to decide whether the exis ing rule is arbitrary and capricious, as Representative Van Hollen has argued.

Representative Chris Van Hollen (D-MD) is represented in the case by the Democracy 21 legal team, led by Roger Witten of WilmerHale, and including lawyers from WilmerHale, Democracy 21 and Public Citizen. Lawyers from the Campaign Legal Center also par icipated in the case.

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EXHIBIT H

Democracy 21

Major Court Victory on Contribution Disclosure

November 25, 2014 All Press Releases, Homepage, Press Releases, Van Hollen v. FEC

Federal District Court In Van Hollen Case Strikes FEC Regulation that Gutted Contribution Disclosure Requirement for Outside Groups Making Expenditures Close to an Election

The federal district court in Washington D.C. today struck down a regulation issued by the Federal Election Commission (FEC) that has severely limited the reporting of donors to groups making "electioneering communications."

The decision was issued in a case brought in 2011 by Rep. Chris Van Hollen (D-MD).

The case challenged a disclosure regula ion issued by the FEC hat limited reporting by groups making "electioneering communications" to only require that they disclose the names of their donors who gave money "for the purpose of furthering electioneering communications."

Under the FEC rule, there has been little or no repor ing of the donors funding groups making electioneering communications. The regulation allowed donors to avoid disclosure simply by claiming they were not giving the contributions to further electioneering communications.

Judge Amy Berman Jackson in today's opinion concluded that the FEC rule impermissibly narrowed the disclosure provision in the Bipartisan Campaign Reform Act (BCRA) which requires a group making electioneering communications to report the names of "all contributors who contributed an aggregate amount of $1,000 or more" to the person making he disbursement for the electioneering communication.

Judge Jackson said he FEC's promulgation of he regulation narrowing the disclosure requirement "was arbitrary, capricious, and contrary to law" and further concluded the regulation "is an unreasonable interpretation of BCRA for several reasons."

The lawsuit was developed by Rep. Van Hollen working with Democracy 21. Rep. Van Hollen was represented in the case by Roger Wilson and his law firm WilmerHale, joined by lawyers from Democracy 21, the Campaign Legal Center and Public Citizen.

According to Democracy 21 President Fred Wertheimer:

> Today's court victory for disclosure shows hat the FEC gutted a statutory contribution disclosure requirement for outside groups making expenditures close to an election.
>
> The FEC through flawed regulations enabled and facilitated the flow of dark money into federal elections. Instead, the FEC should have carried out its statutory responsibili ies to properly implement the disclosure laws.
>
> The FEC must act now to adopt effective contribution disclosure regulations for outside spending groups that serve the interests of the American people and not the interests of anonymous donors and he officeholders who benefit from their secret contributions.

Although the FEC initiated its rulemaking in response to a Supreme Court decision that narrowed the definition of "electioneering communications" for purposes of the ban on corporate and union spending, *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), Judge Jackson found that no hing in that decision required the Commission to narrow the reporting requirements for electioneering communications. She concluded that "the Commission's ac ion was unmoored from the stated basis for embarking on a rulemaking in the first place" and "nothing the

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Supreme Court did in that case provides a basis for narrowing the disclosure rules enacted by Congress."

She also found that "there is little or nothing in the administrative record that would support the Commission's decision to introduce a limitation into the broad disclosure rules in the BCRA." There is, Judge Jackson said, "a very poor fit between the rule hat was promulgated and both the question and the evidence hat were before the agency at the time."

Finally, she said that the language of the regulation that narrows the scope of disclosure "is inconsistent with the statutory language and purpose of the BCRA." She said that the regulation is "contrary to the policy goal that Congress intended to implement" and that the rule "serves to frustrate the aim of the statute because the introduction of a subjective test to the reporting regime creates an exception hat has the potential to swallow the rule entirely."

Judge Jackson concluded that " he fact that some contributors 'just don't want their names known' does not provide grounds to override a clear Congressional choice in favor of transparency."

The court vacated the disclosure regulation, which means that the regulation is no longer in effect.

In March 2012, the district court invalidated the same rule on different grounds. That decision was reversed on appeal by the Court of Appeals for the D.C. Circuit in September 2012, which remanded the case back to the district court for further consideration. Today's opinion addresses the grounds that the D.C. Circuit ordered the district court to review.

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Attachments: (1 total)

Van_Hollen_FEC_112514 Size: 201 kB

EXHIBIT I

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE:	:	
CHRISTOPHER VAN HOLLEN, JR.,	:	
DEMOCRACY 21,	:	
THE CAMPAIGN LEGAL CENTER,	:	**MUR 7024**
Respondents.	:	
	:	

17044202778

DECLARATION OF FRED WERTHEIMER, DEMOCRACY 21

I, Fred Wertheimer, do hereby declare:

1. My name is Fred Wertheimer. I am over the age of eighteen.

2. I serve as the President of Democracy 21. I have been President of Democracy 21 since 1997.

3. Democracy 21 is a nonprofit, nonpartisan organization dedicated to making democracy work for all Americans. Its longstanding goals include working to eliminate the undue influence of big money in American politics, to prevent government corruption, to empower citizens in the political process and to ensure the integrity and fairness of government decisions and elections. It views robust campaign finance laws as necessary to achieve those goals. As a nonpartisan organization, Democracy 21 does not endorse candidates for office.

4. I served as counsel and assisted in the preparation of the relevant filings in *Van Hollen v. FEC*, No. 11-766 (D.D.C. filed Apr. 21, 2011) and in Representative Christopher Van

Hollen, Jr.'s Petition for Rulemaking To Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011). Democracy 21's purpose in participating in these matters is to further its longstanding organizational goals—in particular, the proper interpretation and administration of campaign finance laws. It is not seeking to influence the outcome of any particular election.

5. During the course of our participation in these matters, our client has been Representative Christopher Van Hollen, Jr. ("Rep. Van Hollen"). We do not represent Representative Van Hollen's campaign committee in connection with either matter. To my knowledge, all of Democracy 21's dealings on this matter were with Representative Van Hollen and his congressional staff, and there were no dealings with his campaign committee or campaign staff.

6. Democracy 21 prepared, in whole or in part, the following material, attached as exhibits A, C, D, E, F, G, H to the Response:

Exhibit A: Democracy 21's current mission statement.

Exhibit C: October 1, 2007 comments from Democracy 21, CLC, and the Brennan Center for Justice with respect to the FEC's Notice of Proposed Rulemaking (NPRM) on "Electioneering Communications." *See* NPRM 2007-16, 72 Fed. Reg. 50261 (Aug. 31, 2007).

Exhibit D: October 17, 2007 testimony from Don Simon (on behalf of Democracy 21) and Paul Ryan (on behalf of CLC) with respect to the FEC's NPRM on "Electioneering Communications." *See* NPRM 2007-16, 72 Fed. Reg. 50261 (Aug. 31, 2007).

Exhibit E: April 21, 2011 press release from Democracy 21, "Van Hollen Lawsuit Challenges FEC Regulations as Contrary to Law and Responsible for Eviscerating Donor Disclosure."

Exhibit F: March 30, 2012 press release from Democracy 21, "Federal District Court Strikes FEC Regulation that Gutted Contribution Disclosure By Outside Spending Groups as Contrary to Law in Lawsuit by Representative Van Hollen."

Exhibit G: September 18, 2012 statement from Democracy 21 President, Fred Wertheimer, on D.C. Court of Appeals ruling in *Van Hollen* case.

Exhibit H: November 25, 2014 press release from Democracy 21, "Major Court Victory on Contribution Disclosure."

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct.

Date: May 9, 2016

Name: Fred Wertheimer

Signature: /s/ Fred Wertheimer

EXHIBIT J

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE:	:	
CHRISTOPHER VAN HOLLEN, JR.,	:	
DEMOCRACY 21,	:	
THE CAMPAIGN LEGAL CENTER,	:	**MUR 7024**
Respondents.	:	
	:	

DECLARATION OF J. GERALD HEBERT, THE CAMPAIGN LEGAL CENTER

I, J. Gerald Hebert, do hereby declare:

1. My name is J. Gerald Hebert. I am over the age of eighteen.

2. I serve as the Executive Director of The Campaign Legal Center (CLC). I have been the Executive Director of CLC since 2004.

3. CLC is a nonprofit, nonpartisan organization dedicated to defending and strengthening the public's voice in the political arena. Its longstanding goals are to protect the right to vote and to participate equally in the electoral process regardless of wealth and to ensure that the voices of all citizens be heard and truly matter. CLC represents the public interest in the courts, before regulatory agencies and legislative bodies. As a nonpartisan organization, CLC does not endorse candidates for office.

4. I served as counsel and assisted in the preparation of the relevant filings in *Van Hollen v. FEC*, No. 11-766 (D.D.C. filed Apr. 21, 2011) and in Representative Christopher Van Hollen, Jr.'s Petition for Rulemaking To Revise and Amend Regulations Relating to Disclosure

of Independent Expenditures (Apr. 21, 2011). CLC's purpose in participating in these matters is to further its longstanding organizational goals—in particular, the proper interpretation and administration of campaign finance laws. It is not seeking to influence the outcome of any particular election.

5. During the course of our participation in these matters, our client has been Representative Christopher Van Hollen, Jr. ("Rep. Van Hollen"). We do not represent Representative Van Hollen's campaign committee in connection with either matter. To my knowledge, all of CLCs dealings on this matter were with Representative Van Hollen and his congressional staff, and there were no dealings with his campaign committee or campaign staff.

6. A copy of CLC's current mission statement is attached as exhibit B to the Response.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct.

Date: May 9, 2016

Name: J. Gerald Hebert

Signature: /s/ J. Gerald Hebert

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN, Plaintiff, v. UNITED STATES FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No.

COMPLAINT

Plaintiff Chris Van Hollen for his Complaint, states as follows:

1. This action is a challenge under the Administrative Procedure Act (5 U.S.C. §§ 551-706) to a regulation promulgated by the United States Federal Election Commission ("FEC"). The challenged regulation, 11 C.F.R. § 104.20(c)(9), is arbitrary, capricious, and contrary to law because it is inconsistent with a provision of the Bipartisan Campaign Reform Act ("BCRA")—BCRA § 201, codified at 2 U.S.C. § 434(f)—that the regulation purports to implement. As a consequence, the regulation has frustrated the intent of Congress by creating a major loophole in the BCRA's disclosure regime by allowing corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to make "electioneering communications."

2. In a key provision of the BCRA, Congress required disclosure of disbursements made for "electioneering communications," and provided two options for disclosure of the donors to persons making such disbursements. If the disbursement is paid out of a segregated

bank account consisting of funds contributed by individuals, only donors of $1,000 or more to such account must be disclosed. 2 U.S.C. § 434(f)(2)(E). If the disbursement is not paid out of such a segregated bank account, "the names and addresses of *all* contributors who contributed an aggregate amount of $1,000 or more" to the entity paying for the "electioneering communication" must be disclosed. 2 U.S.C. § 434(f)(2)(F) (emphasis added).

3. The FEC's regulation relating to reporting "electioneering communications" purports to provide a different alternative for disclosure of contributors, but one that is not authorized by law. The regulation requires disclosure of donations of $1,000 or more to corporations, including non-profit corporations, or to labor organizations only when the donation "was made for the purpose of furthering electioneering communications" by the corporation or labor organization. 11 C.F.R. § 104.20(c)(9). Thus, rather than require disclosure of all donors of $1,000 or more to a segregated bank account of the corporation or labor organization from which the disbursements were made, or disclosure of "*all* contributors" of $1,000 or more to the corporation or labor organization making the disbursements, 2 U.S.C. § 434(f)(2)(F) (emphasis added), the regulation requires corporations, including non-profit corporations, to disclose only *some* contributors of $1,000 or more, *i.e.*, donors who have manifested a particular state of mind or "purpose."

4. Congress did not include a "state of mind" or "purpose" element tied to "furthering" electioneering communications in the relevant BCRA provision, 2 U.S.C. § 434(f)(2)(F). The FEC, by adding this requirement in 11 C.F.R. § 104.20(c)(9), contravened the plain language of the statute which requires disclosure of "all contributors" of $1,000 or more to the corporation or labor organization when electioneering communications are not paid from a

segregated bank account. The FEC lacked statutory authority to add the "purpose" element to Congress's statutory disclosure regime for those who fund corporate or union "electioneering communications," and the FEC's regulation adding the "purpose" element is, accordingly, arbitrary, capricious, and contrary to law. Further, the FEC's stated rationale for engrafting a "purpose" requirement is itself irrational, arbitrary, and capricious, rendering it contrary to law.

5. Not only is 11 C.F.R. § 104.20(c)(9) inconsistent with the plain language of the statute, it is also manifestly contrary to Congressional intent and has created the opportunity for gross abuse. Congress sought to require more, not less, disclosure of those whose donations fund "electioneering communications." The FEC's unlawful regulation produces a result that frustrates Congress's objective.

6. Real world experience confirms this conclusion. Relying on the FEC's faulty regulations, many non-profit corporations which spent millions of dollars on "electioneering communications" in the 2010 campaign did not disclose the names of contributors whose donations they used to make "electioneering communications," contrary to the statute and the intent of Congress. As a result, corporations, including non-profits, using bland and unrevealing names, expended millions of dollars on "electioneering communications" to support or attack federal candidates in circumstances where the source(s) of the money spent is unknown to the electorate and to the candidates vying for federal office.

JURISDICTION AND VENUE

7. This action arises under the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 2 U.S.C. §§ 431 *et seq.*, as amended by the Bipartisan Campaign Reform

Act of 2002 ("BCRA"), Pub. L. No. 107-155; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

8. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) because the defendant is a United States agency and because a substantial part of the events or omissions giving rise to the claim occurred in this District.

PARTIES

9. Plaintiff Chris Van Hollen is a Member of the United States House of Representatives from the 8th Congressional District of the State of Maryland. Rep. Van Hollen was elected in 2002 and re-elected every two years thereafter. He next faces re-election in November 2012 and is planning to run for re-election.

10. Rep. Van Hollen is a United States citizen, elected Member of Congress, candidate for re-election to Congress, voter, recipient of campaign contributions, fundraiser, and member of national and state political parties. He faces personal, particularized, and concrete injury from the FEC's promulgation of a regulation (11 C.F.R. § 104.20(c)(9)) that is contrary to the letter and spirit of the BCRA in that it allows corporations and labor organizations to spend unlimited amounts of money on "electioneering communications" without disclosing the identities of persons whose money funds these communications, as required by law.

11. In particular, as a federal officeholder and as a future candidate for federal office, Rep. Van Hollen and his campaign opponents are and will be regulated by the FECA and the BCRA, including 2 U.S.C. § 434(f). The challenged regulation infringes Rep. Van Hollen's

protected interest in participating in elections untainted by expenditures from undisclosed sources for "electioneering communications." If 11 C.F.R. § 104.20(c)(9) stands, Rep. Van Hollen likely will be subjected to attack ads or other "electioneering communications" financed by anonymous donors, and will not be able to respond by, *inter alia*, drawing to the attention of the voters in his district the identity of persons who fund such ads. Rep. Van Hollen, as a citizen and voter, also has an informational interest in disclosure of the persons whose donations are used to fund "electioneering communications" by corporations and labor organizations.

12. Defendant United States Federal Election Commission is a federal agency created pursuant to the Federal Election Campaign Act, 2 U.S.C. § 437c.

FACTS

The FEC Adds A New "Purpose" Requirement To Its Reporting Regulation

13. In 1972, Congress enacted the FECA.

14. In 2002, Congress amended the FECA by enacting the BCRA.

15. The BCRA defines an "electioneering communication" to mean any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office, is made within 30 days before a primary election or 60 days before a general election in which the identified candidate is seeking office, and in the case of Congressional and Senate candidates, is geographically targeted to the relevant electorate. BCRA § 201, 2 U.S.C. § 434(f)(3). A communication may qualify as an "electioneering communication" even if the communication was not made *for the purpose* of supporting or opposing an identified candidate, was not

intended to influence a federal election, or did not otherwise amount to express advocacy, as long as it meets the statutory definition of "electioneering communication."

16. The BCRA, as enacted, prohibited corporations and labor organizations from making "electioneering communications." *See* BCRA § 203, 2 U.S.C. § 441b(b)(2).

17. On December 10, 2003, the Supreme Court rejected a facial challenge to BCRA § 203 in *McConnell v. FEC*, 540 U.S. 93. On June 25, 2007, the Supreme Court held in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 ("*WRTL*"), that BCRA § 203 was unconstitutional as applied to expenditures by corporations for advertisements that did not constitute "express advocacy" or the functional equivalent of express advocacy. *See id.* at 470-76. The court held, "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70.

18. As a result of *WRTL*, it became permissible for corporations and labor organizations to make expenditures for "electioneering communications" that did not constitute "express advocacy" or its "functional equivalent."

19. In response to *WRTL*, the FEC issued a Notice of Proposed Rulemaking, proposing changes to its regulations relating to "electioneering communications." 72 Fed. Reg. 50261 (Aug. 31, 2007). Although the plaintiffs in *WRTL* had not challenged the BCRA's disclosure requirements for "electioneering communications," and the Supreme Court made no ruling in that case concerning those requirements, the FEC proposed to revisit "the rules governing reporting of electioneering communications," 72 Fed. Reg. 50262, *i.e.*, 11 C.F.R.

§ 104.20. The FEC acknowledged that the BCRA required corporations and labor organizations to report "'the name and address of *each* donor who donated an amount aggregating $1,000 or more' to the corporation or labor organization during the relevant reporting period," *id.* at 50271 (emphasis added), but unaccountably sought comment on whether it should add a new rule for corporations and labor organizations: "Should the Commission limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications?" *Id.*

20. On December 26, 2007, the FEC promulgated revised regulations that modified the "electioneering communications" reporting requirements for corporations and labor organizations. Specifically, the FEC added paragraph (c)(9) to 11 C.F.R. § 104.20, which provides that when corporations and labor organizations make expenditures above a certain threshold amount for "electioneering communications" that are not made out of a segregated account, they must disclose the following information:

> If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was *made for the purpose of furthering electioneering communications.*

72 Fed. Reg. 72913 (emphasis added).

21. The FEC also published an "Explanation and Justification for Final Rules on Electioneering Communications" ("E & J"), 72 Fed. Reg. 72899 (Dec. 26, 2007), which relevantly stated with regard to disclosure of donors to a corporation or labor organization making disbursements for "electioneering communications" out of funds that are not in a segregated bank account:

A corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.

Furthermore, witnesses at the Commission's hearing testified that the effort necessary to identify those persons who provided funds totaling $1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort. Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the [Electioneering Communication ("EC")] rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act.

For these reasons, the Commission has determined that the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of funding ECs. Thus, new section 104.20(c)(9) does not require corporations and labor organizations making electioneering communications permissible under 11 CFR 114.15 to report the identities of everyone who provides them with funds for any reason. Instead, new section 104.20(c)(9) requires a labor organization or a corporation to disclose the identities only of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs pursuant to 11 C.F.R. 114.15, during the reporting period. ... Donations made for the purpose of furthering an EC include funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor.

In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs appropriately provides the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor

> organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs.

72 Fed. Reg. 72911.

22. While the E & J refers to the FEC's mistaken understanding of the "policy underlying the disclosure provision of BCRA," the FEC does not even attempt to ground the regulation's "purpose of further electioneering communications" requirement in the actual statutory language Congress enacted in the BCRA, which requires that the identity of "all contributors" of $1,000 or more must be disclosed when the disbursement for an "electioneering communication" is not made from a separate account.

23. The E & J purports to address a "burden" problem, but Congress did not authorize the FEC to consider the issue of "burden" or to promulgate regulations that take "burden" into account.

24. Even apart from the direct and irreconcilable conflict between the statute and 11 C.F.R. § 104.20(c)(9), the E & J's reasoning is irrational, arbitrary, and capricious on its own terms.

25. First, the FEC simply accepted, unquestioningly, the unsupported, self-serving, and conclusory comments of some parties in the Rulemaking as to the existence and extent of the supposed burden on corporations. The FEC did not make any specific factual findings about any such burden. Had the FEC conducted an inquiry, it would likely have found that the alleged burdens were inconsequential for most if not all corporations and labor organizations.

26. Second, in any event, the "purpose" test is unnecessary and irrational to alleviate any actual burden that BCRA § 201, 2 U.S.C. § 434(f), may impose on corporations and labor organizations that wish to make disbursements for "electioneering communications." If a corporation finds compliance with § 434(f)(2)(F)—the "all contributors" provision—too troublesome, it can establish and pay "electioneering communications" expenses out of a segregated bank account consisting of funds donated by individuals, and disclose only the contributors to that account, as the statute expressly allows, 2 U.S.C. § 434(f)(2)(E).

27. The 'purpose' test is further irrational because it is unnecessary to impose that test in order to exclude funds such as corporate revenues from the sales of products and services, the proceeds of debt and equity issuances, and bank loans. It would suffice simply for the regulation to say that those sources of corporate funds are excluded.

28. The "purpose" test is further unnecessary and irrational as applied to not-for-profit corporations, which, real-world experience shows, account for a large portion of the "electioneering communications" that have been made.[1] Moreover, non-profit corporations presumably only make "electioneering communications" that are consistent with their mission, and thus the FEC's purported concern that persons contributing funds to a non-profit corporation might "not necessarily support the corporation's electioneering communications" is irrational.

[1] In 2010, all of the top ten spenders on "electioneering communications" were either "501(c)" or "527" organizations. *See 2010 Outside Spending by Groups*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D (Electioneering Communications filter).

Exploiting 11 C.F.R. § 104.20(c)(9), Corporations Stop Identifying Donors

29. In the aftermath of the FEC's promulgation of 11 C.F.R. § 104.20(c)(9), corporations have exploited the enormous loophole it created.

30. In 2010, persons making "electioneering communications" disclosed the sources of less than 10 percent of their $79.9 million in "electioneering communication" spending. The ten "persons" that reported spending the most on "electioneering communications" (all of them corporations) disclosed the sources of a mere five percent of the money spent. Of these ten corporations, only three disclosed any information about their funders.[2]

31. Not surprisingly, as a result of the regulation, the public record reflects little or no disclosure of the numerous contributors to non-profit corporations that made substantial electioneering communications in the 2010 congressional races. The U.S. Chamber of Commerce, a § 501(c) corporation, spent $32.9 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; American Action Network, a § 501(c) corporation, spent $20.4 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; Americans for Job Security, a § 501(c) corporation, spent $4.6 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; Center for Individual Freedom, a § 501(c) corporation, spent $2.5 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; American Future Fund, a § 501(c) corporation, spent $2.2 million in electioneering communications in the 2010 congressional

[2] *Id.*

elections, and disclosed none of its contributors; CSS Action Fund, a § 501(c) corporation, spent $1.4 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; Americans for Prosperity, a § 501(c) corporation, spent $1.3 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; Arkansans for Change, a § 501(c) corporation, spent $1.3 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors; Crossroads GPS, a § 501(c) corporation, spent $1.1 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors. An additional 15 section 501(c) corporations that made electioneering communications in the 2010 congressional elections disclosed none of their contributors.

32. The corporation that spent the most money in 2010 to fund "electioneering communications," the U.S. Chamber of Commerce, publicly stated on January 13, 2011, that even though it will continue to make "electioneering communications," it will continue not to disclose any of its contributors.[3]

COUNT I: DECLARATORY JUDGMENT

33. Paragraphs 1-32 are incorporated herein. For the reasons alleged, 11 C.F.R. § 104.20(c)(9) is arbitrary, capricious, an abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A).

34. The FEC's action on December 26, 2007, promulgating 11 C.F.R. § 104.20(c)(9), was in excess of its statutory jurisdiction, authority, and right. 5 U.S.C. § 706(2)(C).

[3] *U.S. Chamber Plans to Continue Practice of Not Disclosing Contributors*, BNA MONEY AND POLITICS REPORT, (Jan. 13, 2011).

35. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that 11 C.F.R. § 104.20(c)(9) is unlawful and invalid.

36. Pursuant to 28 U.S.C. § 2202, Plaintiff requests that the Court remand this matter to the FEC for such further action as may be appropriate.

REQUESTED RELIEF

37. Plaintiff requests:

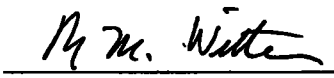
A. That the Court declare that 11 C.F.R. § 104.20(c)(9) is contrary to law, arbitrary and capricious, and invalid;

B. That the Court remand 11 C.F.R. § 104.20(c)(9) to the FEC for further action consistent with such declaration;

C. That the Court retain jurisdiction over this matter to monitor the FEC's timely and full compliance with this Court's judgment; and

D. That the Court grant such other and further relief as it deems proper.

Dated: April 21, 2011



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